No. 91-448

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CARL WILLNER,

Petitioner,

v.

WILLIAM P. BARR, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the Fourth Amendment balancing test set forth in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), and *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (1989), the government can impose a suspicionless drug testing requirement on an applicant for public employment absent a showing that drug use by someone holding the position sought would result in direct and immediate harm to a substantial government interest.

PARTIES TO THE PROCEEDING

The plaintiff in the district court and petitioner here was Carl Willner. The defendants below were then-Attorney General of the United States, Richard L. Thornburgh, and Assistant Attorney General for Administration, Harry H. Flickinger, who were named in their official capacities only. Acting Attorney General William P. Barr has been substituted for Richard L. Thornburgh as a respondent here. *See* Fed. R. Civ. P. 25(d)(1); Sup. Ct. R. 35.4.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Carl Willner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals are reported at 928 F.2d 1185 and are reprinted in the Appendix at pages 1a to 30a. The order of the court of appeals denying petitioner's petition for rehearing is reprinted in the Appendix at page 31a. The order of the court of appeals denying petitioner's suggestion for rehearing *en banc* and statements dissenting therefrom are reprinted in the Appendix at pages 32a to 33a. The memorandum opinion and order of the United States District Court for the District of Columbia are

reported at 738 F. Supp. 1 and are reprinted in the Appendix at pages 36a to 47a.

JURISDICTION

The court of appeals issued its judgment and opinion on March 29, 1991. A timely motion for rehearing was denied by the court of appeals on July 5, 1991, by a 2-1 vote. A timely suggestion for rehearing *en banc* was denied on the same day by the full court of appeals, six of the 12 judges in regular active service dissenting from the denial and one abstaining. App. at 31a-33a. The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1988).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Executive Order No. 12,564, 51 Fed. Reg. 32,889 (1986), the "Department of Justice Drug-Free Workplace Plan" (and an excerpt from Appendix A thereto), the "Department of Justice Drug-Free Workplace Program for the Offices, Boards and Divisions," and pertinent portions of the "Mandatory Guidelines for Federal Workplace Drug Testing Programs," 53 Fed. Reg. 11,970 (1988), are reproduced in the Appendix to this Petition at pages 49a to 120a.

STATEMENT

A. The Department of Justice Applicant Testing Program

In March 1986, the President's Commission on Organized Crime recommended the adoption of "suitable drug testing programs" in all federal agencies as a means of "express[ing] the utter unacceptability of drug abuse" in this country. President's Commission on Organized Crime, Report to the President and Attorney General, *America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime* 452 (March 1986).[1] In response, President Reagan issued Executive Order No. 12,564, 51 Fed. Reg. 32,889 (1986), section 3(d) of which authorizes federal agencies to test "any applicant" for employment for "illegal drug use," irrespective of the position being sought by the applicant, and regardless of whether there is any reason whatsoever to suspect that the applicant has used drugs. App. at 52a.

On September 25, 1987, Attorney General Meese issued the "Department of Justice Drug-Free Workplace Plan" (as amended, the "DOJ Plan"), requiring, *inter alia*, each applicant for any position within the Department to submit to a drug test as a condition of employment. App. at 58a-90a—notwithstanding the acknowledged absence of a drug problem within the Department. *See Harmon v. Meese*, 690 F. Supp. 65, 69 (D.D.C. 1988), *aff'd in part and rev'd in part on other grounds*, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990). The DOJ Plan has been implemented within the Department's Offices, Boards and Litigating Divisions by the "Department of Justice Drug-Free Workplace Program for Offices, Boards and Divisions" (as amended, the "OBD Plan"), issued on June 27, 1988, and amended on November 1, 1989.

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[1] The report also encouraged "private sector employers [to] . . . consider the appropriateness of such . . . testing." *Id.* at 454.

Pursuant to the OBD Plan, applicants are given 48 hours' notice before testing. App. at 100a. Any applicant who fails to appear for his test or refuses to submit to a test is disqualified from further consideration for the position. App. at 100a-101a. In accordance with guidelines established by the Secretary of Health and Human Services, testing is conducted by urinalysis, under procedures that involve close monitoring of the process of urination and collection of the urine sample by federal officials or agents. 53 Fed. Reg. 11,970, 11,980-82 (1988). Any applicant who tests positive may not be offered the position and may not reapply for six months. App. at 101a. During the six-month period ended September 30, 1990, the Department of Justice tested 738 applicants, only three of whom tested positive. United States General Accounting Office, Report to the Chairman, Committee on Governmental Affairs, U.S. Senate, *Employee Drug Testing: Status of Federal Agencies' Programs* 21 (May 1991).

The Department of Justice is just one of 40 federal agencies that, as of September 30, 1990, reported they were conducting drug tests pursuant to President Reagan's Executive Order. *Id.* at 3. In 1988, when mandatory drug testing was first being instituted under the Executive Order, the government announced that applicants for 345,528 positions would be subject to testing. Washington Post, May 7, 1988, at A1. During the six-month period ended September 30, 1991, a total of 15,648 applicants for federal employment were required to submit to urinalysis drug tests; ninety-five (or 0.61%) tested positive. *Employee Drug Testing: Status of Federal Agencies' Programs* at 20-22.

B. Petitioner's Application for an Attorney Position in the Antitrust Division of the Department of Justice

On February 21, 1990, the Department of Justice "tentatively" offered, and petitioner accepted a position as a trial attorney in the Communications and Finance Section

of the Department's Antitrust Division. At the time, petitioner was an attorney in private practice in Washington, D.C. Previously, he had served as a law clerk for two years on the United States Court of Appeals for the Fourth Circuit, one year with Judge Donald Russell and one year with Judge J. Harvie Wilkinson III.

As part of the application process, petitioner was required to complete Standard Form 86—"widely used throughout the government," App. 44a n.5—setting forth detailed information about himself, including, among other things, the fact that he had not used illegal drugs during the previous five years. The Federal Bureau of Investigation then conducted a background check. Petitioner was not required to undergo a medical examination or to obtain a security clearance for access to classified information to secure the position for which he applied.

As an applicant for a position in the Department's Offices, Boards and Divisions, petitioner was also required to submit to a drug test before commencing employment. Petitioner inquired whether he could seek a waiver of the drug testing requirement and was informed that the Department did not grant such waivers to applicants. On February 28, 1990, petitioner received a written "Advance Notice" of drug testing, and was orally informed by a Department representative that his test was scheduled to occur within the following two weeks.

C. The Proceedings in this Case

District Court. On March 8, 1990, petitioner filed suit in the United States District Court for the District of Columbia. The complaint alleged that the Department's applicant testing regime violated his and other applicants' rights under the Fourth Amendment. Federal jurisdiction rested on 28 U.S.C. § 1331 (1988). Petitioner moved for a preliminary injunction to prevent the De-

partment from testing him pending a decision on the merits.

On May 15, 1990, the district court (Gesell, J.) issued a permanent injunction prohibiting respondents from implementing or enforcing the Department's testing requirement with respect to applicants for attorney positions in the Antitrust Division whose jobs do not require top secret security clearances.[2] Applying the Fourth Amendment balancing test set forth by this Court in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), and *Skinner v. Railway Labor Executive Association*, 489 U.S. 602 (1989), App. at 38a, the court held the requirement unconstitutional. "Suspicionless testing," the court observed, "when allowed, has been carefully restricted to persons with special duties of particular public consequence, such as those requiring security clearance, those having direct involvement in jobs affecting public safety, and those working directly with aspects of drug enforcement." *Id.* (citations omitted). The court cited *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990), in which the court of appeals, similarly applying *Von Raab* and *Skinner*, had already held that the Fourth Amendment prohibited the government from requiring Department personnel (including Antitrust Division attorneys) without access to top secret classified information to submit to suspicionless urinalysis testing as a condition of continued employment. App. at 39a. Petitioner's status as an applicant, the district court concluded, did not war-

[2] At oral argument, the court notified the parties that it was contemplating proceeding to the merits of the case under Rule 65(a)(2) of the Federal Rules of Civil Procedure. App. at 37a n.1. Respondents indicated that they did not object to this procedure. *Id.* Petitioner, however, indicated that he wished to have the opportunity to conduct discovery before the district court rendered its final decision on the merits. *Id.*

rant a departure from *Harmon*'s application of the context-specific approach of *Von Raab* and *Skinner*. App. at 40a. Respondents filed a timely notice of appeal.[3]

Court of Appeals. A divided panel of the United States Court of Appeals for the District of Columbia Circuit vacated the injunction issued by the district court. While allowing that the balance between government and privacy interests struck in *Von Raab*, *Skinner*, *Harmon* and other drug testing cases had depended "to a large extent on the nature of the employee's position," App. at 5a, the panel majority (Silberman and Randolph, JJ.) nevertheless declined to examine the job duties of an attorney in the Antitrust Division of the Department of Justice and the relationship between those duties and the need for suspicionless testing. Instead, the majority concluded that petitioner's status as an applicant justified the invasion of privacy occasioned by suspicionless urinalysis drug testing in light of the government's generalized concerns about "maintaining public confidence and trust" and economic efficiency. In reaching this conclusion, the majority relied on the prevalence of applicant testing by large private sector employers and the advance notice of the testing requirement that is given to applicants. App. at 27a.

Judge Henderson dissented. In her view, the majority "fail[ed] to consider an element . . . central to the fourth amendment evaluation" of the drug testing programs in *Von Raab* and *Skinner*: "the connection between an individual's duties and the harm the government seeks to avert through the program." App. at 19a. With respect

[3] Following the district court's decision, petitioner commenced work as an attorney in the Antitrust Division of the Department of Justice. In pleadings filed with the court of appeals, respondents have indicated that petitioner is still subject to the unfulfilled applicant testing requirement in the event they prevail in this litigation. *See* Appellants' Response to Appellee's Petition for Rehearing and Suggestion for Rehearing *En Banc*, filed in *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991), at 2 n.1.

to the firearm-carrying and other drug interdiction personnel in *Von Raab* and the railroad employees in *Skinner*, the threat of harm to public safety was direct and irreparable. Here, any such threat was far more attenuated. By allowing petitioner's applicant status to subsume the "nexus inquiry" (App. at 22a), Judge Henderson warned, the majority had virtually "sanction[ed] a blanket testing requirement for *all* federal job applicants." *Id.* (emphasis added). As for the majority's reliance on private sector practices, Judge Henderson characterized it as "improper and potentially dangerous," App. at 27a, and a marked departure from this Court's Fourth Amendment jurisprudence. In addition, Judge Henderson observed, the majority accorded too much weight to an applicant's advance notice of a testing requirement. App. at 30a. In short, Judge Henderson viewed the majority's balancing as having "put[] the scales in permanent tilt." *Id.*

Petitioner filed a timely petition for rehearing and suggestion for rehearing *en banc*. The original panel denied the petition for rehearing by a 2-1 vote, Judge Henderson again dissenting. App. at 31a. The full court of appeals also denied the suggestion for rehearing *en banc*. App. at 32a. Six of the court's 12 judges in regular active service (Mikva, C.J., and Wald, Edwards, Ruth B. Ginsburg, Sentelle and Henderson, JJ.) voted to grant the suggestion; five (Silberman, Buckley, Williams, Thomas and Randolph, JJ.) voted to deny the suggestion; and one (D.H. Ginsburg, J.) did not participate. App. at 33a.[3] In dissenting from the denial, Judge Wald, joined by Judges Edwards and Ruth B. Ginsburg, wrote:

> This case deserves to be heard *en banc* because it is one of "exceptional importance," . . . potentially

[3] Pursuant to Rule 35 of the Federal Rules of Appellant Procedure, *en banc* reconsideration will be granted only if "[a] majority of the circuit judges who are in regular active service . . ." including judges who abstain, vote to rehear the case. Fed. R. App. P. 35(a).

> affecting the entire body of civil service applicants. If drug testing . . . can be imposed upon any applicant for any government job solely on the basis that such testing will help to ensure a more efficient work force, then a significant and novel inroad on the [Fourth] Amendment's guarantee against "unreasonable" searches has been made.

Id.

Petitioner subsequently filed, and the court of appeals granted, motions to stay the mandate pending application to this Court for a writ of certiorari. App. at 34a and 35a.

REASONS FOR GRANTING THE WRIT

The court of appeals' majority opinion altogether fails to examine the single most important aspect of the Fourth Amendment balancing test set forth in *Von Raab* and *Skinner*: the nexus between the harm that could arise from an employee's drug use and the job at issue. It substitutes for this crucial inquiry an undiscerning reliance on governmental interests relevant to any state or federal job, thus effectively sanctioning the suspicionless urinalysis drug testing of all applicants for public employment.

Recognizing the serious privacy concerns implicated by compulsory urinalysis, this Court in *Von Raab* and *Skinner* upheld suspicionless testing only where the government could demonstrate that employee drug use posed a direct and immediate threat to public safety or national security. These decisions did not turn on whether those whom the government sought to test were applicants or employees. Indeed, the testing program at issue in *Von Raab* covered only applicants, and the Court refused to approve pre-employment testing for positions as to which the requisite nexus appeared lacking. The court of appeals' failure to perform that same analysis here is thus contrary to the decisions of this Court.

Nor can the panel majority's abandonment of the nexus inquiry be justified by the prevalence of applicant testing among large private employers or by an applicant's advance notice of the testing process. The majority's reliance on these factors to define the proper boundaries of Fourth Amendment reasonableness is a marked departure from the decisions of this Court; it suggests that an otherwise unlawful search can be made lawful if it is performed frequently enough by non-governmental entities or if it is announced in advance.

The need to correct this misapplication of the proper Fourth Amendment balance is particularly critical because the consequences of the court of appeals' decision are not limited to petitioner. As Judge Wald observed in her dissent from the denial of the suggestion for rehearing *en banc*, the decision below "potentially affect[s] the entire body of civil service applicants," permitting drug testing to be "imposed upon any applicant for any government job solely on the basis that such testing will help to ensure a more efficient work force." App. 33a.

Indeed, what passes for "balancing" in the majority opinion is in truth a *per se* rule permitting the testing of all applicants for public employment. For having omitted from its inquiry the question whether there is a sufficient nexus between the job duties of an antitrust lawyer and the consequences of his or her drug use, the court of appeals is reduced to an invocation of abstract governmental concerns—the maintenance of public trust and confidence and the realization of economic efficiencies—applicable not merely to petitioner and other applicants for attorney positions in the Antitrust Division, but to any applicants whom the government might subject to drug testing as a precondition of their employment. These generalized interests cannot be deemed sufficiently "compelling" to justify a suspicionless search under the Fourth

Amendment. If they were, Fourth Amendment protections would virtually cease to exist for the tens of thousands of people who apply for public employment.

The court of appeals' decision is wrong and is likely to have far-reaching precedential significance. If allowed to stand, it will serve as a general warrant for the suspicionless urinalysis testing of every applicant for every government job in a circuit where most drug testing cases involving applicants for federal employment are likely to arise. This Court should grant certiorari to revive the job-specific balancing test of *Von Raab* and *Skinner* that the court of appeals has effectively abandoned.

I. THE COURT OF APPEALS' FAILURE TO REQUIRE THAT THE GOVERNMENT ESTABLISH A CLOSE NEXUS BETWEEN THE PARTICULAR JOB AT ISSUE AND THE FEARED CONSEQUENCES OF EMPLOYEE DRUG USE IS INCONSISTENT WITH *VON RAAB* AND *SKINNER*

Only where the government can demonstrate "special needs" transcending ordinary law enforcement will this Court depart from the Fourth Amendment's usual requirements of a warrant and probable cause. *Skinner*, 489 U.S. at 619. For a suspicionless search to pass muster, the government must show that its interests in conducting the search are sufficiently "compelling" (*Von Raab*, 489 U.S. at 670; *Skinner*, 489 U.S. at 628) to outweigh the privacy interests at stake. Thus, where this Court has upheld suspicionless urinalysis drug testing in the past, it has required that the government demonstrate a direct connection—a close nexus—between the requirements of the particular job at issue and the consequences of drug use by someone holding that job.

In *Skinner*, for example, the Court noted that the railroad employees subject to testing "discharge duties fraught

with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." 489 U.S. at 628. The Court further observed that, like those with "routine access to dangerous nuclear power facilities," those workers "can cause great human loss before any signs of impairment become noticeable to supervisors or others." *Id.*

Similarly, in *Von Raab*, the Court viewed the "impaired perception and judgment" of gun-carrying Customs agents as a direct and immediate threat to public safety. 489 U.S. at 671. And with respect to other Customs Service personnel on the front lines of our nation's drug interdiction policy, the Court noted that the "national interest in self-protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics." *Id.* at 670. The Court was careful to distinguish among the various positions embraced by the Customs Service program and remanded to the court of appeals for further proceedings with respect to applicants for certain positions—including attorney positions—as to which the harm of drug use appeared to be less substantial and direct. *See id.* at 678.

Thus, the focus of this Court's balancing inquiry in drug testing cases has been the seriousness and immediacy of the threat posed by employee drug use. The applicant status of those whom the government would test has not made the difference in these cases. Indeed, the testing program in *Von Raab*, like the Department of Justice program at issue here concerned only applicants; the submission to such testing was not a condition of *continued* employment—rather, it was a precondition of employment in a different position. *See* 489 U.S. at 672 n.2 ("Only employees who have been tentatively accepted for promotion or transfer to one of the three categories of

covered positions are tested . . . .").[5] And while the Court did call attention to that aspect of the program, *see id.*, it did so merely in a footnote, as but one of the many factors that bore on the intrusiveness of the testing.[6] Far from resting its decision in *Von Raab* on the applicant status of those whom the government sought to test, the Court conducted a painstaking examination of the jobs there at issue and refused to approve the testing of applicants for attorney positions and other jobs absent the requisite nexus inquiry. Thus, in opposing a petition for a writ of certiorari filed by the employees in *Harmon* who had access to top secret information, the Solicitor General observed that *Von Raab* did not warrant a

> sharp distinction . . . between programs that provide for random testing of persons holding sensitive positions and programs that prescribe so-called "gateway" testing of all applicants for such positions . . . .

Brief for Respondents in Opposition at 8, filed in *Bell v. Thornburgh*, 110 S. Ct. 865 (1990).

Moreover, after *Skinner* and *Von Raab*, this Court in *Rutan v. Republican Party*, 110 S. Ct. 2729 (1990), expressly rejected the creation of such an applicant-employee divide as a measure of constitutional pro-

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[5] Thus, as Judge Henderson noted in her dissent, the Customs Service employee "was . . . in a position identical to [petitioner]'s: by refusing to undergo testing, he did not lose anything he already had, he merely forewent an opportunity for advancement." App. at 27a (citations omitted). Although the panel majority in this case averred that it was "mindful of th[is] fact," (App. at 10a), it proceeded to ignore its import.

[6] The *Von Raab* analysis led the court of appeals in *Harmon* to note that this Court has "not encouraged the construction of . . . a theory" that would require "fundamentally different analys[e]s" for applicants and employees. 878 F.2d at 489. As Judge Henderson noted in her dissent: "Although there may be differences between employees and applicants . . . affect[ing] privacy expectations, [those differences do not] affect the link required between an employee's duties and the dangers posed by his drug use." App. at 21a-22a n.2.

tection. The Seventh Circuit in *Rutan* had found that while the discharge of an employee on the basis of party affiliation violated the First Amendment, the rejection of an applicant on the same basis did not. Relying, as the majority has in this case, *see* App. at 10a, on the plurality opinion of *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the Seventh Circuit had reasoned that "rejecting an employment application does not impose a hardship upon an employee comparable to the loss of [a] job." *Rutan*, 110 S. Ct. at 2739 (citation omitted). This Court disagreed, characterizing the invocation of *Wygant* as "unavailing." *Id.* "A state job is valuable," the Court observed, and its "denial . . . a serious privation." *Id.* at 2738. Thus, while there may be " 'a human difference between losing what one has and not getting what one wants,' " App. at 9a-10a (quoting Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1296 (1975)), such difference does *not* warrant abandonment of the crucial nexus inquiry undertaken by this Court in other drug testing cases.

Nevertheless, the nexus inquiry was ignored by the panel majority in this case. For while conceding that the balance between government and privacy interests struck in other drug testing cases depended "to a large extent on the nature of the employee's position," (App. at 5a), the majority declined to accord any weight to the nature of the position sought by petitioner. Not once did the majority take into consideration the specific responsibilities of an attorney in the Antitrust Division of the Department of Justice or the probable consequences of drug use by one charged with carrying out those responsibilities. Had it done so, it would have been compelled to affirm the judgment of the district court, for as the same court of appeals had already recognized in *Harmon*:

> Certainly a blunder by a Justice Department lawyer may lead, through a chain of ensuing circumstances, to a threat to public safety. That sort of

> indirect risk, however, is wholly different from the risk posed by a worker who carries a gun or operates a train. . . . *Von Raab* and *Skinner* focused on the immediacy of the threat. The point was that a single slip-up by a gun-carrying agent or a train engineer may have irremediable consequences; the employee himself will have no chance to recognize and rectify his mistake, nor will other governmental personnel have an opportunity to intervene before the harm occurs. *Von Raab* provides no basis for extending this principle to the *Justice Department, where the chain of causation between misconduct and injury is considerably more attenuated.*

Harmon, 878 F.2d at 491 (emphasis added; original emphasis omitted). In sum, the panel majority in this case "fail[ed] to consider an element that . . . has been central to the fourth amendment evaluation of all similar government drug testing programs." App. at 19a.[7]

Such failure cannot be justified, as the panel majority would have it, by the existence of private sector applicant testing. As Judge Henderson noted in her dissent, the majority opinion's invocation of private industry practices as the appropriate yardstick for the government's compliance with the dictates of the Fourth Amendment is one of the most "alarming" and "potentially dangerous" (App. at 27a and 30a) aspects of the opinion.

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[7] In this regard, at least, the majority's approach is at odds with the Ninth Circuit's analysis of a Federal Highway Administration requirement that commercial motor vehicle operators administer pre-employment drug tests to applicants for certain driver positions. *See International Bhd. of Teamsters v. Department of Transp.*, 932 F.2d 1292 (9th Cir. 1991). There, the court of appeals focused on the job at issue, emphasizing that "[a] 26,000 pound truck, like the locomotive in [*Skinner*] . . ., 'becomes lethal when operated negligently by persons who are under the influence of . . . drugs.'" *Id.* at 1304 (citation omitted); *see also id.* at 1307 ("[P]reemployment testing ensures that drivers who use drugs never get behind the wheel of a 26,000 pound truck in the first instance.").

The majority reasons, given the prevalence of applicant testing among large private employers, that such testing cannot interfere with the reasonable expectations of privacy of an applicant for governmental employment.[7] But as the majority itself acknowledges, albeit somewhat dismissively, "private employers [are] unconstrained by the Fourth Amendment [and] may engage in practices the government as employer cannot." App. at 14a. *See also United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (Fourth Amendment applies only to government searches). Thus, nowhere in *Von Raab* or *Skinner* did this Court consider private sector practices in gauging the privacy expectations of those whom the government would search.[8] Indeed, notwithstanding the existence of private

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[7] The panel majority does not cite any evidence relating to the prevalence of drug testing at law firms. It relies instead on surveys of large corporations whose employees' job duties are vastly different from those of antitrust attorneys. But what Trans World Airlines or Exxon does in screening future airline pilots or oilfield hands has little relevance to the privacy expectations of an applicant for an attorney position in the Antitrust Division of the Department of Justice. Over his objection, petitioner was denied the opportunity to conduct discovery and submit evidence regarding private sector practices (including the extent to which law firms conduct applicant testing). *See supra* at note 2. Thus, even if the court of appeals may have been correct in relying on those practices, it should have remanded to the district court for further proceedings. The court of appeals' failure to do so denied petitioner his procedural right to make a record on factual issues upon which the court of appeals based its decision.

The same is true of the court of appeals' reliance on a purportedly "undisputed" affidavit regarding the extent to which the process of urination is monitored by government officials. App. at 7a. Inasmuch as petitioner was denied the opportunity to rebut the allegations in the affidavit, the court of appeals' remedy was wrong even if its judgment may have been correct. The court should have remanded to the district court to give petitioner an opportunity to dispute the allegations in the affidavit.

[8] Judge Henderson further points out in her dissent that "[t]his is true throughout the line of decisions leading up" to *Von Raab*

industry applicant testing programs at the time those cases were decided, this Court in *Skinner* noted that "the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable." 489 U.S. at 617; *see also id.* at 618 (noting that drug testing raises concerns not implicated by compulsory blood and breath tests); *Von Raab*, 489 U.S. at 680 (urinalysis testing is "particularly destructive of privacy and offensive to personal dignity") (Scalia, J., dissenting).

The existence of suspicionless urinalysis testing in the private sector cannot of its own force legitimize a search objectively considered intrusive, such as mandatory urinalysis. That is particularly so where, as here, the private sector's practices developed with the encouragement of the government, which now seeks to bootstrap its own testing by what it has wrought for private employees. *See supra* at note 1.

Under the majority's analysis, the pressures of the market, not the standards of the Constitution, serve as the only palpable constraint on government searches; even the most Orwellian search can, if performed routinely enough in the private sector, survive Fourth Amendment

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and *Skinner*. App. at 28a n.6. In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the Court did not examine the practices of private school officials in holding that the Fourth Amendment restricted the actions of a public school administrator in his search of a student's purse. And in *O'Connor v. Ortega*, 480 U.S. 709 (1987), the plurality did not invoke private industry in determining whether a government employee's reasonable expectations of privacy extended to the contents of his office. *California v. Greenwood*, 486 U.S. 35 (1988), is not to the contrary. The issue there was whether the Fourth Amendment prohibits the warantless search and seizure of the contents of garbage left outside the curtilage of a home. The Court held that "'[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.'" *Id.* at 41 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). *Von Raab* establishes that an applicant does not, simply by applying for a job, knowingly expose his or her urine or metabolites to public scrutiny.

scrutiny. By importing private industry norms into the Fourth Amendment balance, the majority engages in a kind of constitutional privatization alien to our most cherished traditions. It turns on its head Justice Brandeis's famous aphorism—articulated in a Fourth Amendment case—that government is "the potent, the omnipresent teacher" that "[f]or good or for ill . . . teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), *overruled*, *Katz v. United States*, 389 U.S. 347 (1967). The protections of the Fourth Amendment will quickly vanish if courts adopt the conduct of the private sector as the benchmark of "reasonableness." Even when acting as employer, the government is held to a standard that private actors are not—the Constitution of the United States.

Nor can an applicant's advance warning of a drug testing requirement, and his or her ability to avoid the testing process by *not* applying for the job, justify abandonment of the nexus inquiry. If, simply by providing advance notice, the government could make lawful an otherwise unlawful search, applicants could be subjected to suspicionless, warrantless searches of their homes as a precondition of employment. Thus, as Judge Henderson points out, "[t]he same factor was present in *Von Raab*, but the Court there attributed little, if any significance to it . . . ." App. at 27a (footnote omitted).[10] While advance notice might "reduc[e] to a minimum any 'unsettling show of authority' that may be associated with unexpected intrusions on privacy," *Von Raab*, 489 U.S. at 672 n.2 (citation omitted), it does not

[10] As the Solicitor General argued in *Bell v. Thornburgh*: "The Court's observation in a footnote in *Von Raab* that under the program at issue there 'applicants know at the outset that a drug test is a requirement of' employment . . . does not justify a fundamentally . . . [different] standard for random [and gateway] testing programs . . . ." Brief for Respondents in Opposition at 8, filed in *Bell v. Thornburgh*, 110 S. Ct. 865 (1990).

reduce the other unsettling aspects of an intrusive search —the loss of personal privacy and dignity and the violation of bodily integrity. The government cannot avoid the dictates of the Fourth Amendment simply by giving notice of an impending intrusion.

II. THE COURT OF APPEALS' MISAPPLICATION OF THE FOURTH AMENDMENT BALANCING INQUIRY, IF LEFT UNCORRECTED, WILL SERVE AS A WARRANT FOR THE TESTING OF ALL APPLICANTS FOR GOVERNMENT EMPLOYMENT

The need to correct the court of appeals' misapplication of the proper Fourth Amendment balancing inquiry in this case is especially acute because it virtually "sanctions a blanket testing requirement for *all* federal job applicants" (App. at 22a) (emphasis added), in a circuit likely to pass on most drug testing cases involving applicants for federal employment. For having excluded from its inquiry a careful analysis of the job duties of an attorney in the Antitrust Division of the Department of Justice and the relationship between those duties and the harm the government would seek to avert through its testing program, the panel majority upholds the testing here at issue on the basis of highly abstract considerations relevant to the pre-employment screening of applicants for virtually any government job: the government's interests in "maintaining public confidence and trust" (*id.*), and in minimizing hiring and training costs (*id.*). Such interests cannot by themselves justify suspicionless urinalysis testing, however. Neither of them can compare with the "compelling interests in safeguarding our borders and the public safety" in *Von Raab*, 489 U.S. at 677, or the "compelling" interest in "prevent[ing] accidents and casualties" in *Skinner*, 489 U.S. at 620-21.

The government's interest in demonstrating to the country that the Antitrust Division of the Department of Justice is drug-free simply lacks the immediacy and

urgency necessary to justify suspicionless urinalysis testing. The same interest might be claimed by any department or agency of state or federal government. Indeed, even though the Commissioner of the Customs Service had announced at the outset of the Service's program that it "'would set an important example in our country's struggle with this most serious threat to our national health and security,'" *Von Raab*, 489 U.S. at 686 (Scalia, J., dissenting) (citation omitted), the Court in *Von Raab* declined to rely on that rationale in its opinion, focusing instead on the job-specific nexus inquiry. As Justice Scalia observed, it is obvious that the government's interest "in show[ing] . . . the world that the [Customs] Service is 'clean' . . . is [an] unacceptable [justification for suspicionless testing]; . . . symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search." *Id.* at 686-87. (Scalia, J., dissenting).

Similarly, the government's interest in minimizing training and hiring costs cannot justify suspicionless urinalysis testing, absent a sufficiently close nexus. Neither *Von Raab* nor *Skinner* took economic considerations into account as a justification for the government's mandatory drug testing programs. To view the government's interest in minimizing its hiring and training costs as "compelling" enough to justify a suspicionless search that, no matter how discreet the government's monitoring of the physical act of urinataion, must be regarded as a substantial intrusion upon personal dignity, is to render the Fourth Amendment little more than an empty exhortation against unreasonable government searches.[11]

[11] The court of appeals cites no evidence—and none was proffered by respondents—that applicant testing in the Department of Justice actually does minimize hiring and training costs. Indeed, the court of appeals ignores the fact that the government has spent approximately $77,000 for each positive test result it has obtained to date. *See* Washington Post, Mar. 30, 1991, at A5 (citing House Civil Service Subcommittee Findings). On this point, too, the

"Convenience and efficiency are not the primary objectives —or the hallmarks—of democratic government," this Court observed in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 944 (1983).[12]

This Court should review the decision of the court of appeals to make clear that such generalized interests are not enough—and that (regardless of whether the person being tested is an applicant or employee) there must be a clear, direct nexus between the duties of the particular job and the potential harm from drug use by an employee holding that job. Should the court of appeals' decision stand, it will undermine this Court's decisions in *Von Raab* and *Skinner* and serve as a general warrant for the suspicionless urinalysis testing of any applicant for any government job.

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court of appeals should have given petitioner the opportunity to make a factual record. *See supra* at note 8.

[12] This Court has always been loathe to subject constitutional rights to a pure cost-benefit analysis. *See, e.g., Tashjian v. Republican Party*, 479 U.S. 208, 218 (1986) ("cost of administering election system not a sufficient basis for infringing on First Amendment rights of free association"); *Boucher v. Synar*, 478 U.S. 714, 736 (1986) ("economic [considerations] of unprecedented magnitude" cannot save a law or procedure that is "'contrary to the Constitution'") (citation omitted); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("[T]he Constitution recognizes higher values than speed and efficiency.").

CONCLUSION

For the reasons stated above, certiorari should be granted to review the judgment of the court of appeals.

Respectfully submitted,

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September 12, 1991

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 90-5156

CARL WILLNER,

Appellee,

v.

RICHARD L. THORNBURGH, *et al.*,

Appellants.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 90-0535)

Argued Oct. 11, 1990

Decided March 29, 1991

Stephen H. Sachs, Baltimore, Md., with whom Stephen M. Cutler and Gail C. Bernstein, Arthur B. Spitzer and Elizabeth Symonds, Washington, D.C., were on the brief, for appellee.

Robert V. Zener, Atty., Dept. of Justice, with whom Stuart M. Gerson, Asst. Atty. Gen., and Jay B. Stephens, Washington, D.C., U.S. Atty., were on the brief, for appellants.

Before SILBERMAN, HENDERSON and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge RANDOLPH.

Dissenting opinion filed by Circuit Judge HENDERSON.

RANDOLPH, Circuit Judge:

This appeal adds to the list of constitutional challenges to federal drug-testing programs established pursuant to Executive Order No. 12,564, 51 Fed.Reg. 32,889 (1986). Since the Supreme Court's decision in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), which involved a portion of the Customs Service's program, we have ruled on aspects of the drug-testing programs of the Executive Office of the President (*Hartness v. Bush*, 919 F.2d 170 (D.C.Cir.1990)); the Department of Agriculture (*National Treasury Employees Union v. Yeutter*, 918 F.2d 968 (D.C.Cir.1990)); the Department of Transportation (*American Federation of Government Employees v. Skinner*, 885 F.2d 884 (D.C.Cir.1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 1960, 109 L.Ed.2d 321 (1990)); the Department of the Army (*National Federation of Federal Employees v. Cheney*, 884 F.2d 603 (D.C.Cir.1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 864, 107 L.Ed.2d 948 (1990)); and the Department of Justice (*Harmon v. Thornburgh*, 878 F.2d 484 (D.C.Cir.1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 865, 107 L.Ed.2d 949 (1990)).

Each of our decisions rendered in the wake of *Von Raab* concerned federal employees who were, as a condition of employment, required to submit urine specimens for testing without any suspicion they were using drugs, and who were selected for testing on a random basis. This case differs from the rest in several respects, the significance of which is in dispute. The plaintiff here is an applicant for government employment. Rather than being selected at random, every applicant must undergo a urine test before being hired for the position he seeks.

Early in 1990, Carl Willner, an attorney, submitted a résumé to the Antitrust Division of the Department of Justice in Washington, D.C. After several interviews, he received and accepted a conditional offer to join the Antitrust Division as a trial attorney. In connection with his employment application, Mr. Willner completed an extensive form setting forth detailed information about himself. The Federal Bureau of Investigation then conducted an investigation. On the form, Mr. Willner denied having used marijuana, cocaine, narcotics, hallucinogenics or other illegal drugs during the previous five years. He refused, however, to comply with the Department's request that he provide a urine sample.

The Department of Justice drug-testing plan requires all persons tentatively selected for employment in the Department's Offices, Boards and Divisions to provide a urine sample for testing. Applicants are notified at least forty-eight hours in advance of the time and place for the test. If they fail to show up or refuse to provide a urine sample, they are disqualified from further consideration for the job. If the chemical test of their sample is positive, they will not be offered the position and may not reapply for six months. The chemical analysis is designed to detect use of cocaine, marijuana, amphetamines, opiates and phencyclidine, and is the same as that described in *American Federation of Government Employees*, 885 F.2d at 887-88; *National Federation of Federal Employees*, 884 F.2d at 606; and *Harmon*, 878 F.2d at 486.

Before applying to the Antitrust Division, Mr. Willner knew of the Department's drug-testing program and of its requirement that all individuals tentatively selected for employment must undergo urinalysis. While in private practice, Mr. Willner represented the plaintiffs in *Harmon v. Thornburgh*, the first of our drug-testing decisions issued after *Von Raab*. *Harmon* sustained random testing of Department of Justice employees having

top secret security clearances, but held that suspicionless urinalysis of other Justice Department personnel violated the Fourth Amendment unless those individuals were engaged in drug prosecutions. In view of *Harmon*, the Justice Department could not require urine tests of attorneys already holding the position Mr. Willner sought, unless they were suspected of drug use.

The district court framed the question as: "whether, between a current Antitrust Division attorney and an applicant for such a position, there is a constitutional distinction that would render the testing of the latter permissible under the Fourth Amendment" (Memorandum of District Court, May 15, 1990, at 4) 738 F.Supp. 1. The court found no such distinction and concluded that the government's interests in requiring the test were the same as those *Harmon* rejected as insufficient. The court therefore permanently enjoined the Department of Justice from testing applicants for positions when employees occupying those positions could not be tested.

I

Von Raab, 109 S.Ct. at 1390, and its companion case, *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 1413, 103 L.Ed.2d 639 (1989), held that the government's collection and testing of urine samples from employees according to the procedures outlined in those decisions invaded "reasonable expectations of privacy" and were therefore Fourth Amendment "searches." Such searches, even if conducted without probable cause or suspicion of drug use, do not necessarily infringe upon the Fourth Amendment's "right of the people to be secure in their persons . . . against unreasonable searches, . . ." *Von Raab* ruled that "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is *im-*

practical to require a warrant in the particular context." 109 S.Ct. at 1390 (emphasis added).

Von Raab's balancing test is inherently, and doubtless intentionally, imprecise. The Court did not purport to list all of the factors that should be weighed or to identify which factors should be considered more weighty than others. *See Harmon*, 878 F.2d at 488-89. Nonetheless, balance we must. The condition making it necessary to do so—that the "Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement" (*Von Raab*, 109 S.Ct. at 1390)—is satisfied in this case. *Railway Labor Executives*, 109 S.Ct. at 1414, on which *Von Raab* relied in formulating the standard just quoted, stated that the government's interest in the "operation of a government office"—here the Department of Justice—presents such "special needs." 109 S.Ct. at 1390. Furthermore, the Justice Department does not test applicants for law enforcement purposes; the test results are not distributed and cannot be used as evidence in a criminal trial. Exec.Order No. 12,564, 51 Fed.Reg. at 32,892. *See also Von Raab*, 109 S.Ct. at 1390-91.

In our other decisions concerning random drug testing of incumbents, the balance we struck turned to a large extent on the nature of the employee's position. When the job involved drug enforcement or when the employee's drug use might endanger others, for example, we have recognized that the government's interests are sufficiently strong to allow random testing. *Harmon*, 878 F.2d at 490-91; *National Treasury Employees Union*, 918 F.2d at 972; *American Federation of Government Employees*, 885 F.2d at 891-92; *National Federation of Federal Employees*, 884 F.2d at 612, 613. The job Mr. Willner sought fell within neither category. But that is neither the beginning nor the end of our inquiry. The protections of the Fourth Amendment are graduated in proportion to the privacy interests affected. Decreasing

levels of intrusiveness require decreasing levels of justification. If the reasonable privacy expectations of applicants are less than those of employees and if the testing procedure for applicants is itself unintrusive, the government is not required to demonstrate as high a degree of justification as it must to conduct random testing of those already employed.

II

We shall deal first with the extent of privacy interests applicants such as Mr. Willner possess with respect to urine testing. In other contexts, when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search" (*Camara v. Municipal Court*, 387 U.S. 523, 533, 87 S.Ct. 1727, 1733, 18 L.Ed.2d 930 (1967)), the Fourth Amendment does not require a warrant. *See Griffin v. Wisconsin*, 483 U.S. 868, 873-74, 107 S.Ct. 3164, 3168, 97 L.Ed.2d 709 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 340, 105 S.Ct. 733, 742, 83 L.Ed.2d 720 (1985); *O'Connor v. Ortega*, 480 U.S. 709, 725-26, 107 S.Ct. 1492, 1501-02, 94 L.Ed.2d 714 (1987) (plurality opinion). When the "privacy interests implicated by the search are minimal," the Court has recognized, as it did in *Von Raab* and *Railway Labor Executives*, that a warrantless search may be reasonable even in the absence of suspicion of illegal conduct. *T.L.O.*, 469 U.S. at 342 n. 8, 105 S.Ct. at 743 n. 8.

As we read the Court's opinions in *Von Raab* and *Railway Labor Executives*, even a current employee's "expectation of privacy," while "reasonable" enough to make urine testing a Fourth Amendment "search," can be so "diminished" that the search is not "unreasonable." *See Von Raab*, 109 S.Ct. at 1390, 1394. This simply recognizes that Fourth Amendment "searches" vary in their intrusiveness. Taking a person's fingerprints, for example, and ransaking a person's dwelling place, while both "searches" (*see Hayes v. Florida*, 470 U.S. 811, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985); *Davis v. Mississippi*,

394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969)), may require different degrees of justification to make them "reasonable." The district court in this case was surely correct that "an applicant has some expectation of privacy; in applying for a job he does not thereby consent to, for example, a warrantless search of his home" (Memorandum of District Court, May 15, 1990, at 8). But urine testing, particularly in view of the procedures followed at the Justice Department, is on a different end of the spectrum.

Railway Labor Executives, 109 S.Ct. at 1413, held that urine testing involves two searches, the first when the sample is collected and the second when it is analyzed. As to the first search—the collection process—Justice Department applicants are subjected to far less of an intrusion than were the employees in *Railway Labor Executives* and *Von Raab*. In those cases, a "monitor of the same sex as the employee remain[ed] close at hand to listen for the normal sounds of urination" or to observe directly as the employee produced the sample. *Von Raab*, 109 S.Ct. at 1388; *Railway Labor Executives*, 109 S.Ct. at 1413; *id.* at 1428 (Marshall, J., dissenting); *see Harmon*, 878 F.2d at 486. This procedure, which Justice Scalia found "offensive to personal dignity," *Von Raab*, 109 S.Ct. at 1398 (dissenting opinion), and which the Court relied upon in finding a Fourth Amendment search, *Railway Labor Executives*, 109 S.Ct. at 1413, is not part of the Justice Department's program for applicants. There is no purposeful invasion of privacy of the sort involved in *Von Raab* and *Railway Labor Executives*. A Justice Department applicant produces the sample, not in a stall or behind a partition, as in *Von Raab*, but in the privacy of a small room behind a closed door, unless there is reason to suspect tampering. The Program Coordinator of the Department's drug-testing program, in an undisputed affidavit, stated that the sounds of urination cannot be heard and that the Department "certainly does not expect or require the collection person to hover

near the door listening for urination sounds. After the individual is escorted to the enclosure, the collection monitor returns to the waiting room to receive the specimen from the individual." For these reasons, the collection process at the Department of Justice simulates what is a common medical procedure, an accepted part of a typical physical examination required by athletic teams, colleges, the military, life insurance companies and private employers. *See Bratcher v. United States*, 149 F.2d 742, 745 (4th Cir.), *cert. denied*, 325 U.S. 885, 65 S.Ct. 1580, 89 L.Ed. 2000 (1945); *see also, McDonnell v. Hunter*, 612 F.Supp. 1122, 1130 n. 6 (S.D.Iowa 1985), *modified*, 809 F.2d 1302 (8th Cir.1987).

As to the second search involved in urine testing, the chemical analysis, *Railway Labor Executives* indicates that this invades privacy because it may reveal "private medical facts about an employee" (109 S.Ct. at 1413). But applicants for employment at the Justice Department cannot reasonably expect to keep such information secret. The only medical facts revealed to the Justice Department are whether the applicant has recently used illegal drugs. By divulging, as Mr. Willner did, whether he uses, or has used within the past five years, marijuana, cocaine, narcotics, hallucinogenics, or other dangerous or illegal drugs, and by consenting to an F.B.I. investigation in which his friends, neighbors, relatives and past and present business associates may be asked if he uses drugs, an applicant relinquishes whatever privacy he might otherwise retain with respect to such information, even when the information is derived from chemical analysis.

We begin then with a comparatively slight disturbance of the applicant's privacy. The collection process is dignified and discreet and unlike that described in *Railway Labor Executives* and *Von Raab*; the later test reveals no information that can, under the circumstances, be considered private. Other considerations further diminish

the privacy expectations of job applicants like Mr. Willner. They know they will have to undergo a drug test if they are tentatively selected for employment at the Justice Department. Pre-employment testing is not random. Unlike the incumbents in *Harmon*, all applicants must provide a urine sample before being hired. The procedure is scheduled ahead of time and the applicant is given advance notice of the date. All of this, *Von Raab* indicated, reduces "to a minimum" the unsettling effect of unexpected intrusions. *Von Raab*, 109 S.Ct. at 1394 n. 2; *see Harmon*, 878 F.2d at 489. We recognize, of course, that the government cannot defeat a person's "reasonable" expectation of privacy merely by giving notice of the impending intrusion. See *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring); *United States v. Taborda*, 635 F.2d 131, 137 (2d Cir.1980); Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn.L.Rev. 349, 384 (1974). But the applicant's knowledge of what will be required, and when, affects the strength of his or her interest. We so held in *National Federation of Federal Employees v. Weinberger*, 818 F.2d 935, 943 (D.C.Cir. 1987): "Advance notice of the employer's condition, however, may be taken into account as one of the factors relevant to the extent of the employees' legitimate expectations of privacy."

Similarly, it is significant that the individual has a large measure of control over whether he or she will be subject to urine testing. No one is compelled to seek a job at the Department of Justice. *See Wyman v. James*, 400 U.S. 309, 324, 91 S.Ct. 381, 389, 27 L.Ed.2d 408 (1971). If individuals view drug testing as an indignity to be avoided, they need only refrain from applying. This too is an important distinction between applicants and incumbents. The choice presented to current employees—undergo random drug testing or lose your job—is not comparable to that facing applicants. In Judge Friendly's words, "there is a human difference between

losing what one has and not getting what one wants." Friendly, *Some Kind of Hearing*, 123 U.PA.L.REV. 1267, 1296 (1975). The plurality opinion in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 282-83, 106 S.Ct. 1842, 1851, 90 L.Ed.2d 260 (1986), recognized as much: "Denial of a future employment opportunity is not as intrusive as loss of an existing job." *See Harmon*, 878 F.2d at 489 n. 6.

We are mindful of the fact that the Customs Department employees in *Von Raab* became subject to drug testing only because they chose to apply for promotions. To that extent, they also had control over whether they would be tested and they had advance knowledge of the testing. The Supreme Court considered these factors among others that served to diminish their expectation of privacy. 109 S.Ct. at 1394 n. 2. We follow the same analysis. Rather than considering a factor separately to determine if it alone would be decisive, we must aggregate the factors on each side in order to strike the balance required by *Von Raab*. *See Hartness*, 919 F.2d at 172.

For applicants, still other factors further weaken their privacy expectations with respect to urine testing. As we have mentioned, in order to be considered for a position as an attorney at the Department of Justice, an applicant is required to undergo a thorough and exhaustive background investigation. The applicant is required to complete Standard Form 86 (SF-86), the government "Questionnaire for Sensitive Positions." The information requested includes the address of each of the applicant's residences during the past fifteen years; every job the applicant has held for the last fifteen years; and all organizations, domestic and foreign, with the exception of labor unions and political and religious organizations, of which the applicant has been a member during the last fifteen years. The applicant must also disclose all foreign countries he has visited. He must list all his immediate

relatives and the names and addresses of four persons who know him well. The applicant is required to disclose any arrests, criminal charges, or convictions; he must reveal whether he, his spouse, or a company controlled by him has ever declared bankruptcy, been declared bankrupt, been subject to a lien, or had a judgment rendered against them for a debt. The applicant is also asked whether he has ever had a nervous breakdown or medical treatment for a mental condition.

The applicant must also provide information about his involvement with alcohol and illegal drugs. Specifically, the applicant is asked: "Do you now use or supply, or within the last 5 years have you used or supplied, marijuana, cocaine, narcotics, hallucinogenics, or other dangerous or illegal drugs"? The instructions accompanying the form remind the applicant that "knowingly falsifying or concealing a material fact is a felony which may result in fines of up to $10,000, or 5 years imprisonment, or both." The applicant must also sign a release authorizing,

> any duly accredited representative of the Federal Government, including those from the U.S. Office of Personnel Management, the Federal Bureau of Investigation, and the Department of Defense, to obtain any information relating to my activities from schools, residential management agents, employers, criminal justice agencies, financial or lending institutions, credit bureaus, consumer reporting agencies, retail business establishments, medical institutions, hospitals or other repositories of medical records, or individuals. This information may include, but is not limited to, my academic, residential, achievement, performance, attendance, personal history, disciplinary, criminal history record, arrest, conviction, medical, psychiatric psychological, and financial and credit information.

SF-86 at 10.

In addition, applicants for positions at the Justice Department are required to sign a form authorizing the release of their federal income tax returns for the last five years. Joint Appendix (J.A.) 202. The applicant is also fingerprinted for the purposes of checking criminal records. When SF-86 and the tax waiver form have been submitted, the Federal Bureau of Investigation conducts a background investigation. As described by the Executive Officer of the Antitrust Division of the Justice Department,

> The background inquiry is thorough. At a minimum, the FBI will contact all references and close personal associates listed on the SF-86, as well as former spouses, employers and co-workers. The FBI will also conduct neighborhood checks on all residences, interviewing landlords and neighbors. . . . A regional credit bureau check is also conducted, covering all areas in which the applicant has lived. Military records and police records in all jurisdictions in which the applicant has resided are also examined.

Thus, as a general matter, applicants for Justice Department positions cannot reasonably expect to—and in fact do not—shield their private lives from government scrutiny during the hiring process. The background investigation is an extraordinarily intrusive process designed to uncover a vast array of information about those applying for jobs in the Department of Justice. As the Supreme Court stated in *Von Raab*, 109 S.Ct. at 1397, this "especially" "may be expected to diminish their expectations of privacy in respect to a urinalysis test." *See American Federation of Government Employees*, 885 F.2d at 893; *National Federation of Federal Employees*, 884 F.2d at 612-13.

Common practice, in the government and in the private sector, is also a measure of the degree of privacy job applicants reasonably can expect. *See O'Connor v. Or-*

tega, 480 U.S. 709, 732, 107 S.Ct. 1492, 1505, 94 L.Ed.2d 714 (1987) (Scalia, J., concurring); *Transportation Institute v. U.S. Coast Guard*, 727 F.Supp. 648, 655 (D.D.C.1989). Plagued with increased absenteeism, lower productivity, and workplace disruption connected with employee drug use, private companies have increasingly turned to drug testing as a means of dealing with the problem. A recent study by the Bureau of Labor Statistics found that drug-testing programs have become fairly common in the nation's largest firms. The study showed that the larger the work force, the more likely the employer would have a drug-testing program. Almost 60 percent of private employers with 5,000 or more employees had such programs and another 11 percent were considering implementing one. Bureau of Labor Statistics, U.S. Department of Labor, Survey of Employer Anti-drug Programs, Report 760, at 6, table 1 (Jan. 1989) (J.A. 174).

Overall, "[d]rug-testing programs are aimed more towards job applicants than employees." *Id.* at 5 (J.A. 173). More than 85 percent of employers with drug-testing programs tested job applicants; of those that tested job applicants, 83 percent tested *all* applicants while only 16 percent limited testing to selected occupations. *Id.* at 8, table 4 (J.A. 176). Some of the nation's largest employers, including American Telephone & Telegraph, DuPont, Exxon, Federal Express, Trans World Airlines, and United Airlines, have drug-testing programs for job applicants. *See* Adams, *Random Drug Testing of Government Employees: A Constitutional Procedure*, 54 U.CHI.L.REV. 1335, 1337 (1987). Such testing has become more common in recent years. Between 1982 and 1985 the number of FORTUNE 500 corporations having drug-testing programs more than doubled. Rothstein, *Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law*, 63 CHI.-KENT L.REV. 683, 703 (1987).

These statistics are of course quite general. They say nothing, for example, about the hiring processes of large private law firms. It is also true that private employers, unconstrained by the Fourth Amendment, may engage in practices the government as employer cannot. Nonetheless, what is occurring generally outside government is some indication of what expectations of privacy "society is prepared to accept as 'reasonable' " when the government engages in the hiring process. *Katz v. United States*, 389 U.S. at 361, 88 S.Ct. at 516 (Harlan, J., concurring). *See California v. Greenwood*, 486 U.S. 35, 40-41 & nn. 3, 4, 108 S.Ct. 1625, 1628-29 & nn. 3, 4, 100 L.Ed.2d 30 (1988), which relied on private practices to determine what was a "reasonable" expectation of privacy.

III

On the other side of the scale are the interests of the Justice Department. The purpose of weighing the government's interests against those of applicants is to determine whether it would be "impractical to require" that before testing a job applicant, the Justice Department obtain a warrant or suspect that the person is using drugs. *Von Raab*, 109 S.Ct. at 1390. Our focus is on the government in its role as an employer at the hiring stage. The Department of Justice, of course, is not just any employer. It has a legitimate interest in maintaining public confidence and trust. Drug use among its employees would undermine the Department's credibility as the nation's leading law enforcement agency. But it has other concerns. To the Justice Department, like any other employer, an applicant is a stranger. The hiring process at the Department of Justice, particularly the interviews and background investigation, is designed to gather information so that a judgment may be made regarding the individual's suitability for employment. That too is the purpose of pre-employment drug testing. To require a warrant or individualized suspicion at the

hiring stage would therefore all but defeat the purpose of testing applicants.

The Justice Department's interest with respect to applicants is thus not simply promoting a public image of integrity, which *Harmon* deemed insufficient by itself to overcome the interests of incumbents. 878 F.2d at 490. Any employer, including the Justice Department, makes a considerable investment in terms of time and money whenever it hires someone. The hiring process itself entails substantial costs. Those new to the job must be trained and ordinarily will require some period of time on the job before they reach full productivity. For economic reasons alone, the Department is therefore entitled to compile pertinent information about those who seek positions with it. That is the only sensible way to predict how an applicant would perform and it is why private employers, with increasing frequency, are drug testing applicants. If the practice became even more widespread, if the private sector almost invariably tested for drugs while the public sector did not, individuals with drug problems might tend to migrate toward government employment. Yet the government, no less than private employers, has a very substantial interest in preventing such individuals from entering its work force.

Recent empirical studies have shown that individuals who test positive in pre-employment drug tests have higher rates of absenteeism and involuntary separation. The United States Postal Service, in an ongoing study of the relationship between drug test results and job performance, has found that "[e]mployees who tested positive for drugs were found to have a 47% higher rate of involuntary separation than those who tested negative," and "the positive group had[] a 59% higher absence rate than the negative group." U.S. Postal Service, An Empirical Evaluation of Preemployment Drug Testing in the United States Postal Service—Second Interim Report of Findings, at II (Sept.1989). Another, more limited

study, "found that those with marijuana-positive urine samples have 55% more industrial accidents, 85% more injuries, and a 78% increase in absenteeism. For those with cocaine-positive urine samples, there was a 145% increase in absenteeism and an 85% increase in injuries." Zwerling, Ryan & Orav, *The Efficacy of Preemployment Drug Screening for Marijuana and Cocaine in Predicting Employment Outcome*, 264 J.A.M.A. 2639, 2643 (Nov. 28, 1990). These studies and others mentioned in the Postal Service report thus confirm what one would expect —an extremely high correlation between a positive result in a pre-employment drug test and subsequent employment problems. *See also*, R. DeCresce, M. Lifshitz, A. Mazura & J. Tilson, Drug Testing in the Workplace (1989); M. De Bernado, Drug Abuse in the Workplace: An Employer's Guide for Prevention (1987).

The government's interest in detecting drug use is substantial at the pre-employment stage because, as we have already mentioned, the applicant is an outsider. Background checks and information supplied by the applicant assist the government in making what can, at best, be only a prediction about the individual. The fact remains that the applicant is a person the government, as prospective employer, has had no opportunity to observe in the setting of the workplace. This too differentiates applicants from incumbents. In *Harmon* we noted that Justice Department "employees . . . work in 'traditional office environments,' in which drug use is, presumably, more easily detected by means other than urine testing." 878 F.2d at 489. In regard to incumbents, therefore, direct observation together with the reasonable suspicion test may uncover those employees who ought to be tested. That obviously is not true for applicants and is another factor to be weighed in favor of finding it "impractical" for the Justice Department to obtain warrants or information leading it to suspect drug use before requiring candidates for employment to be tested. *See Von Raab*,

109 S.Ct. at 1397 ("In assessing the reasonableness of requiring tests of these employees, the court should also consider . . . the supervision to which these employees are already subject."). For these reasons, commentators otherwise opposed to drug testing of incumbents have concluded that the government, without violating the Fourth Amendment, may require job applicants to undergo urine testing. *See* 3 W. LAFAVE, SEARCH AND SEIZURE § 10.3, at 123-24 (Supp.1991); Note, *Employee Drug Testing—Balancing the Interests in the Workplace: A Reasonable Suspicion Standard*, 74 VA.L.REV. 969, 991-92 (1988); Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Theory of Legality Under the Fourth Amendment*, 48 U.PITT.L.REV. 201, 236-37 (1986).

IV

Our conclusion is that for job applicants like Mr. Willner their privacy expectations in regard to the Justice Department's urine testing requirement are significantly diminished and are far less than those of incumbents. Unlike current employees, job applicants are routinely required to reveal considerable amounts of information about themselves, information the employer uses to make responsible hiring decisions. The urine testing procedure at the Justice Department minimizes the intrusion and the chemical analysis later performed on the urine sample reveals no information the applicant has a cognizable interest in keeping secret. An applicant may avoid even this minimal invasion of privacy by not seeking employment with the Justice Department. On the other hand, the Justice Department's interests, as an employer, in requiring applicants to undergo urinalysis are strong. Drug testing in the context of a job application is commonplace. Although an employer may monitor an incumbent's performance, and thus be required to have individualized suspicion before subjecting the employee to

urinalysis, such a requirement for testing applicants would be "impractical." *Von Raab*, 109 S.Ct. at 1390.

For these reasons we hold that urine tests of applicants for positions as attorneys at the Justice Department do not constitute "unreasonable searches" under the Fourth Amendment. The district court's injunction is therefore vacated.

So ordered.

HENDERSON, Circuit Judge, dissenting:

In holding that the Department of Justice may require an applicant to submit to urinalysis as a precondition of employment in the Antitrust Division, the majority in my view impermissibly restricts the protection of the fourth amendment. Along the way, it gives inadequate weight to existing circuit authority, bases its opinion on a palpable logical inconsistency, improperly injects a new element into the fourth amendment equation and conducts its balancing test with a thumb firmly on the government's side of the scale.

It is well established in fourth amendment jurisprudence that, in order to compel an individual to submit to suspicionless drug testing, the government must establish that its interests in conducting the testing outweigh the individual's reasonable expectations of privacy. *See, e.g., Hartness v. Bush*, 919 F.2d 170, 172 (D.C.Cir.1990). The Supreme Court conducted this balancing test in two recent decisions, *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), and *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) and we have applied the principles from these decisions in several recent opinions, including *Harmon v. Thornburgh*, 878 F.2d 484 (D.C.Cir.1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 865, 107 L.Ed.2d 949 (1990). These three decisions provide the tools necessary to conduct the

balancing inquiry here. I believe the majority, however, misuses those tools.

I.

The first, and to my mind the paramount, flaw in the majority's opinion is its failure to consider an element that, until today, has been central to the fourth amendment evaluation of all similar government drug testing programs. Courts that have considered the constitutionality of drug testing programs have examined the connection between an individual's duties and the harm the government seeks to avert through the program. Only when the government has established a sufficient nexus between the two has the program been upheld.

In *Skinner*, for example, the Court focused on the "safety-sensitive tasks" that railroad employees perform, 109 S.Ct. at 1414, and found testing justified because the covered employees "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Id.* at 1419. Analogizing the railroad workers to those with "routine access to dangerous nuclear power facilities," the Court noted that they "can cause great human loss before any signs of impairment become noticeable to supervisors or others." *Id.*

Similariy, in *Von Raab*, the Court held that, in testing drug interdiction personnel, the government had a "compelling interest," 109 S.Ct. at 1393, that proceeded from at least two of the dangers that employee drug use created. First, the Court noted the "national interest in self protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics." *Id.* Second, the Court recognized the special dangers present when a government employee carries a firearm: "We agree with the Government that the public should not bear the risk that employees who may suffer

from impaired perception and judgment will be promoted to positions where they may need to employ deadly force." *Id.*

In addition, this court has insisted that the nexus portion of the fourth amendment analysis be satisfied. In *Harmon*, we required a "clear, direct nexus . . . between the nature of the employee's duty and the nature of the feared violation" in order to uphold a mandatory urinalysis program aimed at protecting classified information. 878 F.2d at 490. Noting that, in *Von Raab*, the Supreme Court had found such a nexus to exist with respect to "truly sensitive information," 109 S.Ct. at 1396, we ruled that "the government may properly make testing a requirement for holding a top secret security clearance." 878 F.2d at 492.[1] Our decision in *Harmon* applied, however, only to the narrow class of Justice Department employees whose drug use, we held, could pose a sufficiently direct and immediate danger to warrant the intrusion of mandatory urinalysis. We emphasized that the requisite nexus does not exist for all Justice Department lawyers: "The government has . . . required that all employees who prosecute criminal cases must undergo random testing. We do not believe, however, that under *Von Raab* an attorney who prosecutes *antitrust* or securities fraud cases can plausibly be analogized to a customs agent whose job is drug interdiction." 878 F.2d at 491 (emphasis added; original emphasis omitted); *see also id.* at 498 (Silberman, J., concurring) (noting the constitutional difficulties posed by testing of employees who are "never involved with drug-related crime" and concurring in court's "refusal to authorize drug testing of employees (like those in the *Antitrust* or Civil Rights Division) who are not responsible for drug-related criminal investiga-

[1] We later followed the *Harmon* analysis in *Hartness v. Bush*, 919 F.2d at 173, where we upheld a program in the Executive Office of the President requiring testing of all employees with secret (as opposed to top secret) security clearances.

tions and prosecutions"). (emphasis added; original emphasis omitted).

In its opinion, the majority fails even to consider the relationship between the duties of a Justice Department antitrust lawyer and the threat that lawyer could pose if drug-impaired. The omission may proceed from a recognition that the nexus inquiry requires invalidation of the testing program in this case. That much is clear from our decision in *Harmon*:

> Certainly a blunder by a Justice Department lawyer may lead, through a chain of ensuing circumstances, to a threat to public safety. That sort of indirect risk, however, is wholly different from the risk posed by a worker who carries a gun or operates a train . . . .
>
> . . . *Von Raab* and *Skinner* focused on the immediacy of the threat. The point was that a single slip-up by a gun-carrying agent or a train engineer may have irremediable consequences; the employee himself will have no chance to recognize and rectify his mistake, nor will other government personnel have an opportunity to intervene before the harm occurs. *Von Raab* provides no basis for extending this principle to the *Justice Department, where the chain of causation between misconduct and injury is considerably more attenuated.*

878 F.2d at 491 (emphasis added; original emphasis omitted). Moreover, in *Harmon*, we explicitly declared that the requisite nexus does not exist with respect to Justice Department antitrust lawyers.

Nor can the majority's omission of the nexus requirement be justified by distinguishing Willner's status as an applicant from that of the incumbent employees in *Harmon* and *Skinner*.[5] The *Harmon* court characterized the

[5] Although there may be differences between employees and applicants that are significant to the fourth amendment's analysis, they

threshold nexus requirement as demanding a close relationship between "the employee's duty and the nature of the feared violation." *Id.* at 490. The aim of the instant testing program is not to prevent some drug-related harm that Willner might cause *before* he secures employment at the Justice Department. It is only *after* he is hired that his potential drug use could threaten any harm the Department as an employer has an interest in preventing. At that point, he is identical to the antitrust lawyers in *Harmon* who, according to this court, could not be constitutionally subjected to mandatory drug testing.

Taken to its logical end, the majority's reasoning sanctions a blanket testing requirement for all federal job applicants. In *Harmon*, however, we held that "federal employment alone is not a sufficient predicate for mandatory urinalysis." 878 F.2d at 490; *see also National Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603, 613 (D.C.Cir.1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 864, 107 L.Ed.2d 948 (1990). Accordingly, I would hold that simply applying for federal employment is too slim a reed to support mandatory drug testing.

II.

My disagreement with the majority does not end with its failure to make the nexus inquiry. It identifies two governmental interests that favor the drug testing program: the "interest in maintaining public confidence and trust," maj. op. at 1192, and the high cost of hiring and training new employees. Maj. op. at 1192. The majority

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affect privacy expectations and not the link required between an employee's duties and the dangers posed by his drug use. *See infra*, Part III; *see also Harmon*, 878 F.2d at 489 n. 6 (losing job is greater hardship than failing to obtain job; mandatory drug testing may therefore be more intrusive when result of individual's refusal to submit to testing is discharge rather than merely missing job opportunity).

immediately acknowledges that this court has previously held the government's interest in "promoting a public image of integrity" to be "insufficient" to overcome employee privacy interests. Maj. op. at 1192-1193. Indeed, in *Harmon*, this court categorically announced that, even in conjunction with other asserted governmental interests, "the government's integrity interest cannot justify" a drug testing program covering all Justice Department lawyers who conduct grand jury proceedings or try criminal cases. *Harmon*, 878 F.2d at 490-91; *see also id.* at 498 (Silberman, J., concurring) (government's "powerful interest in preventing drug use" does not justify testing all Justice Department lawyers). This leaves "economic reasons," maj. op. at 1192, as the sole interest on the government's side of the scale.

I do not disagree with the majority that the government has a substantial interest in minimizing the expenses it incurs in the hiring and training of new Justice Department personnel. Nor do I dispute the majority's position that this interest permits the government to "compile pertinent information about those who seek positions" with the Justice Department in order to avoid the documented pernicious effects of employee drug use. Maj. op. at 1192. We do part company, however, where the majority concludes that the need to evaluate a potential employee's fitness justifies subjecting all applicants to the "needless indignity," *Von Raab*, 109 S.Ct. at 1400-01 (Scalia, J., dissenting), of urine testing.[3]

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[3] The fate on an applicant whose test is positive leaves open to some doubt the extent to which the Department's program effectively reduces its recruiting and training expenses. An applicant who has tested positive may reapply after six months and, if he then tests negative, may presumably be hired. Maj. op. at 1187. Thus, the Justice Department appears willing to employ individuals of whose drug use it has conclusive evidence if they can pass the drug test a second (or, theoretically, third or fourth) time. The factor that qualifies an applicant for employment, then, appears to be not what past experience reveals about the likelihood that he will use illegal

In concluding that mandatory urinalysis provides the government with the necessary means to investigate an applicant's fitness, the majority first considers in meticulous detail the sweep and effect of the FBI background investigation in relation to its impact on the applicant's privacy interests. Characterizing the investigation as "extraordinarily intrusive," maj. op. at 1191, and "thorough and exhaustive," maj. op. at 1190, the majority concludes that the background check, designed as it is to "uncover a vast array of information," maj. op. at 1191, about an applicant, significantly diminishes the reasonable privacy expectations of anyone applying to the Justice Department. But the majority at one time both runs with the foxes and hunts with the hounds. For when it turns to the government's interests supporting the testing program, the majority apparently concludes that the investigation it formerly found so complete now leaves the Justice Department with no insight whatsoever into an applicant's fitness. The Department may use drug testing in its hiring process, we are told, because an applicant is "an outsider," a "stranger," someone whom the government "has had no opportunity to observe in the setting of the workplace." Maj. op. at 1192, 1193.

Given this volte-face, one wonders which is the more accurate characterization of the FBI check: Is it "extraordinarily intrusive" and "thorough and exhaustive" or is it an inquiry that leaves its subject a "stranger?" From the majority's description, *see* maj. op. at 1190-1191, the investigation seems much more the former than the latter. If that is so, the crucial question then is whether the marginally greater information that drug testing reveals about an applicant justifies the substan-

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drugs but rather his ability to once test negative. This consideration makes the Department's program appear to be less a means to screen out applicants likely to use illegal drugs and more an "immolation of privacy and human dignity in symbolic opposition to drug use." *Von Raab*, 109 S.Ct. at 1398 (Scalia, J., dissenting).

tially increased intrusion on the applicant's privacy. *Cf. Delaware v. Prouse*, 440 U.S. 648, 659-60, 99 S.Ct. 1391, 1399, 59 L.Ed.2d 660 (1979) (examining practice's "incremental contribution" to safety to determine whether it "qualif[ied]" as a reasonable law enforcement practice under the Fourth Amendment"). I have no difficulty answering this question in the negative. It is true that the FBI check does not conclusively establish that the applicant uses no illegal drugs; but even urinalysis cannot always do this. *See Von Raab*, 109 S.Ct. at 1396. The investigation does, however, make available to the Justice Department significant information from which it can evaluate the applicant's fitness and likely drug use.

Chief among this information is what the FBI learns from an applicant's former employers and co-workers. During the application process, an applicant must disclose all jobs he has held for the past fifteen years and he must permit government officials to request of his former employers information relating to his "achievement, performance, attendance, personal history, [and] disciplinary . . . history." Questionnaire for Sensitive Positions, Standard Form 86. The FBI also questions an applicant's present and former co-workers. Joint Appendix at 230. It ignores the nature of this inquiry to conclude, as the majority does, that the extensive information obtained provides no basis whatsoever to evaluate a prospective employee's likely drug use. The information the government receives from former employers and co-workers regarding the applicant's past professional conduct and work product is precisely the sort that will shed the most light on an applicant's tendency toward illegal drug use.

Furthermore, as a Justice Department antitrust lawyer, Willner will not be in a position analogous to those of the Customs Service field agents who the *Von Raab* Court held could be tested. There, the Court concluded that a mandatory urinalysis program complied with the fourth amendment in part because of the difficulty of monitoring

an individual's fitness by subjecting his "work-product to the kind of day-to-day scrutiny that is the norm in more traditional office environments." 109 S.Ct. at 1395. Here, by contrast, Willner has accumulated and revealed to the government an extensive history of performance in traditional office environments.[5] By the time he sought employment with the Justice Department, Willner had completed law school, two year-long federal appellate clerkships and over four years' practice at a large law firm. He had worked in just the sort of "traditional office environments" that the *Von Raab* Court noted allow a performance evaluation that may render mandatory drug testing an unreasonable search under the fourth amendment. Indeed, this court has recently stressed the significance of an office setting "in which drug use is, presumably, more easily detected by means other than urine testing." *Harmon*, 878 F.2d at 489. In light of the government's ability to gauge Willner's professional performance through its "exhaustive" background investigation and Willner's established work record, the majority seems to wink at reality when it concludes that the government's need for information weighs heavily in favor of mandatory pre-employment testing.

III.

In analyzing the applicant's reasonable expectations of privacy, I believe the majority also errs in the weight and effect it gives two different factors. First is that,

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[5] Lawyers apply to the Department of Justice in two different ways. The first group of applicants is composed of individuals, like Willner, who have gained professional experience after law school. Joint Appendix at 208. The Department also hires new lawyers through its Honor Program, "a highly competitive program in which applicants are selected from among the most outstanding recent law school graduates and judicial law clerks." Declaration of Thomas King, Joint Appendix at 199. Willner falls into the first group of applicants—that composed of individuals who have gained professional experience.

as an applicant with notice of the testing requirement, he triggers the process himself. This factor, while relevant, *see National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 943 (D.C.Cir.1987), does not merit the weight the majority gives it in concluding that an applicant's reasonable expectations of privacy are "significantly diminished." Maj. op. at 1193. The same factor was present in *Von Raab*,[5] but the Court there attributed little, if any, significance to it, merely identifying it in a footnote, without elaboration, as affecting the employees' privacy expectations. *See Von Raab*, 109 S.Ct. at 1394 n.2; *see also Harmon*, 878 F.2d at 489. As discussed above, the *Von Raab* decision turned on the efficacy of urinalysis in preventing particular harms, not on the privacy implications of advance warning of the testing requirement. Accordingly, the majority's focus on the notice aspects of the challenged program inappropriately departs from the course of previous balancing tests in similar contexts.

More significantly, I fear that the majority's consideration of private industry drug-testing practices as part of its constitutional analysis is both improper and potentially dangerous. It is beyond question that mandatory urinalysis, both of applicants and incumbent employees, is common in private industry. Nevertheless, private em-

[5] In *Von Raab*, only an employee who applied for transfer or promotion was subject to the testing program and the employee knew in advance of the urinalysis requirement. *Von Raab*, 109 S.Ct. at 1388. An individual who refused to submit to testing lost only the opportunity for a promotion; he did not risk losing a job. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 173 (5th Cir. 1987). He was therefore in a position identical to Willner's: by refusing to undergo testing, he did not lose anything he already had, but merely forewent an opportunity for advancement. *Cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-83, 106 S.Ct. 1842, 1851, 90 L.Ed.2d 260 (1986) (plurality opinion) (denial of a future employment opportunity is not as intrusive as loss of an existing job). Maj. op. at 1190. The Court did not, however, treat this as a distinction that diminished the individual's expectations of privacy.

ployers' practices cannot, and until today have not, become the yardstick by which we measure the government's compliance with constitutional mandates. The government is unique in being subject to the dictates of the Constitution; private entities are bound by no such strictures. *See United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984) (fourth amendment "is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government") (internal quotation omitted); *see also Walter v. United States*, 447 U.S. 649, 656, 100 S.Ct. 2395, 2401, 65 L.Ed.2d 410 (1980); *Burdeau v. McDowell*, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921). It is therefore wholly inappropriate for the majority to import into a fourth amendment analysis consideration of private sector practice.[6]

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[6] While admittedly not conclusive, I find it significant that before today, the Supreme Court and other courts, including this one, have not considered the impact of private sector activity on an individual's reasonable expectations of privacy. This is true throughout the line of decisions leading up to *Skinner* and *Von Raab*. In *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), the Court applied the fourth amendment to a municipality's housing code inspection program. Nowhere did the Court consider the effect on a resident's privacy expectations of the fact that landlords might retain the right to enter and inspect their tenants' homes. In *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), the Court first held that the fourth amendment restricted the actions of a public school official in his search of a student's purse. *Id.* at 333-34, 105 S.Ct. at 738. It then balanced the "individual's legitimate expectations of privacy and personal security" against the "government's need for effective methods to deal with breaches of the public order." *Id.* at 337, 105 S.Ct. at 740. In its analysis, the Court did not consider whether private school officials, who are unfettered by the fourth amendment, subject their students to searches. In *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987), the plurality opinion omitted any examination of private industry conditions in analyzing the privacy expectations of an individual challenging a government employer's search of his office. *See also Bluestein v. Skinner*, 908 F.2d 451, 456 (9th Cir.1990),

The phenomenon of private industry's employee drug testing is not something that has occurred so recently that this court is the first to have the opportunity to consider its fourth amendment implications. Similar conditions existed at the time *Von Raab* and *Skinner* were decided, as well as when we faced the issue in *Harmon*. *See* Bureau of Labor Statistics, U.S. Department of Labor,

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cert. denied, —— U.S. ——, 111 S.Ct. 954, 112 L.Ed.2d 1042 (1991) (considering reasonableness of FAA-mandated urinalysis for airline employees, the court ignored impact on privacy expectations of airlines' privately implemented testing programs although such programs existed).

Neither of the decisions the majority relies on is to the contrary. In *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the Court held that the government could not electronically eavesdrop on an individual's conversation from a public phone booth because it violated his reasonable expectations of privacy. In *California v. Greenwood*, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988), the Court held that an individual has no reasonable expectation of privacy in garbage left outside the curtilage of his property because "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Id.* at 41, 108 S.Ct. at 1629 (quoting *Katz*, 389 U.S. at 351, 88 S.Ct. at 511). By deliberately placing their garbage where it was readily accessible to members of the public, the Court held, the *Greenwood* respondents had relinquished their expectations of privacy with respect to it. *Id.* at 40-41, 108 S.Ct. at 1628-29. By applying to the Justice Department, Willner has not relinquished his privacy expectations regarding the significantly more intrusive search here.

In order to come within the fourth amendment's protection, an individual's expectation of privacy must be "one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. at 361, 88 S.Ct. at 516 (Harlan, J., concurring). Contrary to the majority's reasoning, however, in order to be reasonable, this expectation of privacy does not have to be one that society recognizes between an individual and his private employer. Were there such a requirement, the court's task would be easy indeed since we would be constrained to permit the government to invade the privacy of its employees in the various ways available to a private employer. Until today, however, the fourth amendment has been construed to hold the government—even when acting as an employer—to a higher standard.

Survey of Employer Anti-drug Programs, Report 760, at 6 (Jan. 1989). In spite of the prevalence of mandatory urinalysis for private employees, however, neither this court nor the Supreme Court relied on the practice to justify such a government program. The reasons for this omission seemed obvious before today. The protections the Constitution provides against arbitrary government action will quickly evaporate if courts adopt, as the benchmark of fourth amendment reasonableness, the conduct of private entities.

IV.

I find myself unable to join in the majority's opinion today. In conducting its balancing test, the majority dispenses with the requirement that the testing be reasonably calculated to avert some harm that a drug-impaired employee is likely to cause and it ignores the importance that its own opinion elsewhere attributes to the background check the FBI conducts on prospective employees. The majority attributes greater significance than ever before to the facts that an individual has notice of the testing requirement and that he triggers it himself by applying for employment. Most alarming, the majority inserts into the fourth amendment calculus the new element of private industry norms.

As the majority notes, the balancing test to be conducted under *Von Raab* is "imprecise," maj. op. at 1187, and "[r]ather than considering a factor separately to determine if it alone would be decisive, [the court] must aggregate the factors on each side in order to strike the balance." Maj. op. at 1190. The approach adopted by the majority, however, puts the scales in permanent tilt. For this reason, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5156

CARL WILLNER

v.

RICHARD L. THORNBURGH, Attorney General,
Appellant

Before: Silberman, Henderson and Randolph, Circuit Judges

ORDER

[Filed Jul. 5, 1991]

Upon consideration of appellee's petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Henderson would grant the Petition for Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5156

CARL WILLNER

v.

RICHARD L. THORNBURGH, Attorney General,
Appellant

Before: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

ORDER

[Filed Jul. 5, 1991]

Appellee's Suggestion For Rehearing *En Banc* and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge D. H. Ginsburg did not participate in this matter.

Chief Judge Mikva and Circuit Judges Wald, Edwards, Ruth B. Ginsburg, Sentelle and Henderson would grant the suggestion for rehearing *en banc*.

A statement of Circuit Judge Henderson is attached.

A statement of Circuit Judge Wald, joined by Circuit Judges Edwards and Ruth B. Ginsburg, is attached.

KAREN LECRAFT HENDERSON, *Circuit Judge*:

I fully expressed my view of the merits of this case in dissenting from the panel's opinion. For the reasons expressed therein, I continue to disagree with the decision to reverse the district court and permit the Justice Department to require lawyer applicants to its Antitrust Division to submit to urine testing as part of the application process. Accordingly, I dissent from today's order denying rehearing en banc.

Statement of WALD, *Circuit Judge*, with whom EDWARDS and RUTH B. GINSBURG, *Circuit Judges*, join, dissenting from the denial of the suggestion for rehearing *en banc*: For reasons discussed in Judge Henderson's dissent, I believe that the reasoning of the panel opinion is extremely problematical and should be considered by the court *en banc*. This case deserves to be heard *en banc* because it is one of "exceptional importance," *see* Fed. R. App. P. 35(a), potentially affecting the entire body of civil service applicants. If drug testing, which constitutes a "search" under the Fourth Amendment, can be imposed upon any applicant for any government job solely on the basis that such testing will help to ensure a more efficient work force, then a significant and novel inroad on the Amendment's guarantee against "unreasonable" searches has been made. In my view, this case is therefore eminently deserving of the attention of the full court, and consequently, I dissent from the denial of the suggestion for rehearing *en banc*.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5156

CARL WILLNER,

Appellee

v.

RICHARD L. THORNBURGH, Attorney General,
Appellant

Before: Silberman, Henderson and Randolph, Circuit Judges

ORDER

[Filed Jul. 18, 1991]

Upon consideration of appellee's Motion for Stay of Mandate, it is

ORDERED, by the Court, that the motion is granted and the Clerk is directed to withold issuance of mandate through August 12, 1991.

Per Curiam:
FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5156

CARL WILLNER

v.

RICHARD L. THORNBURGH, Attorney General,
Appellant

Before: Silberman, Henderson and Randolph, Circuit Judges

ORDER

[Filed Aug. 6, 1991]

Upon consideration of appellee's unopposed motion for further stay of mandate it is

ORDERED, by this Court, that the motion is granted and the Clerk is directed to withhold issuance of the court's mandate through September 12, 1991.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 90-0535

CARL WILLNER,

Plaintiff,

v.

RICHARD L. THORNBURGH, *et al.*,
Defendants.

May 15, 1990

Stephen H. Sachs, Stephen M. Cutler, Washington, D.C., for plaintiff.

Peter Robbins, U.S. Dept. of Justice, Washington, D.C., for defendants.

MEMORANDUM

GESELL, District Judge.

This is yet another case concerning the federal government's effort to create a drug-free workplace for its employees by compelling urine drug testing without any suspicion of drug use. In this instance, the individual plaintiff, Carl Willner, challenges drug testing required during pre-screening of new employees under the Department of Justice Drug Free Work Place Plan ("DOJ Plan") adopted pursuant to Executive Order 12,564, which declared, inter alia, that "[p]ersons who use illegal drugs are not suitable for Federal employment."

Willner is an attorney who has been in private practice in the District of Columbia. He has been tentatively accepted for employment by the Antitrust Division of the Justice Department. His position would not require access to Top Secret classified information, at least initially. Nevertheless, pursuant to standard practice under the DOJ Plan, Willner was asked to submit to a urine test to determine possible recent drug use. He refused as a matter of principle and brought this action to test the constitutionality of this aspect of the DOJ Plan.

The case is before the Court on Willner's motion for preliminary injunction, which has been fully briefed and was argued on April 24, 1990. Because the motion papers, which include declarations and supporting data, fully present the issues, and controlling facts are undisputed, the Court will dispose of the case on the merits pursuant to Fed.R.Civ.P. 65(a)(2).[1]

A one-time mandatory pre-employment screening urine test is required of all attorneys accepted for positions in the Department of Justice's Offices, Boards and Divisions (OBD) component, which includes the Antitrust Division. Under the current, revised OBD plan, every individual tentatively selected for empyoyment in OBD must provide a urine sample for drug testing in order to be hired.

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[1] The Court notified the parties at oral argument that it contemplated proceeding to the merits under this rule. Although counsel for Willner insisted that the case was not ready for final resolution because facts remained in dispute, counsel for the Justice Department indicated that he did not object. However, on May 7, 1990, the Department filed a motion to dismiss or for summary judgment, which essentially constituted an additional reply brief on selected issues. The Court concludes that the "factual" issues still in dispute—concerning the accuracy of the drug testing program and the extent to which there is a drug problem at the Department of Justice—are not material in the present context. Accordingly, the Court sees no reason to await another round of the increasingly acrimonious briefs filed in this case.

The relevant testing procedures are detailed in the Supreme Court's decision in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 1388-89, 103 L.Ed.2d 685 (1989). In general, the applicant is provided 48 hours advance notice. The applicant must go to a designated testing location and provide a sample behind a partition or stall with an attendant present outside. The attendant does not observe the urination unless there is reason to suspect tampering.

It is well settled that a non-consensual urine drug test is a search governed by the requirements of the Fourth Amendment to the Constitution. *Von Raab*, 109 S.Ct. at 1390. However, suspicionless testing is not unconstitutional per se, so long as it serves some governmental interest beyond the normal need for law enforcement. *Id.* In such cases, though, a reviewing court must "balance the individual's privacy expectations against the government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Id.*

Various urine drug testing plans affecting federal employees have been the subject of various court decisions. The courts in this Circuit have applied the Fourth Amendment on a case-by-case basis. Suspicionless testing of employees *or* applicants, when allowed, has been carefully restricted to persons with special duties of particular public consequence, such as those requiring security clearance, those having direct involvement in jobs affecting public safety, and those working directly with aspects of drug enforcement. *See Harmon v. Thornburgh*, 878 F.2d 484 (D.C.Cir.1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 865, 107 L.Ed.2d 949 (1990); *National Federation of Federal Employees v. Cheney*, 884 F.2d 603 (D.C. Cir.1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 864, 107 L.Ed.2d 948 (1990); *American Federation of Government Employees v. Skinner*, 885 F.2d 884 (D.C.Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 1960, 109

L.Ed.2d 1960 (1990); *Transportation Institute v. U.S. Coast Guard*, 727 F.Supp. 648 (D.D.C.1989).

In *Harmon*, the Court of Appeals held that the government's interests in work-force integrity, public safety, and protecting sensitive information did not make reasonable under the Fourth Amendment OBD's plan for random drug testing of certain existing employees, including Antitrust Division attorneys. While the Court of Appeals upheld random testing for employees with access to Top Secret classified information and suggested that drug testing of drug prosecutors would be permissible, it rejected the Department's plan to drug-test all criminal prosecutors and all employees with access to grand jury materials. The central issue in this case, then, is whether, between a current Antitrust Division attorney and an applicant for such a position, there is a constitutional distinction that would render the testing of the latter permisisble under the Fourth Amendment.

The Department's position stems from its appraisal of the drug problem in the work place expressed in the fololwing terms when the DOJ Plan was announced:

> Studies show that employees who use drugs tend to be less productive and less reliable. Impairments from the use of illegal drugs can linger for days beyond the time the use [sic] may recognize the immediate effects of the drug. Even for employees who use drugs off-duty, then, illegal drug use can have an unpredictable impact on judgment and performance on duty. And, of course, there is no guarantee that an employee using drugs off-duty will not someday soon begin using illegal drugs on the job. Drugs can induce changes in behavior that endanger co-workers or members of the public. Drug-users may also be susceptible to espionage, bribery, and blackmail.

There is no basis in fact to dispute the Department's original view of the possible consequences of employees'

drug use or these observations, although the examples of actual known use by Department of Justice workers are relatively few.

In support of its pre-screening test program, the Department emphasizes that an individual can avoid testing by withdrawing his application when notified of the testing requirement and argues (1) that the expectation of privacy and resulting invasion of privacy are less than that which occurs in the case of an existing employee singled out for random testing; and (2) that the need for drug testing of applicants is enhanced by the reduced opportunity to observe these individuals as compared to existing employees.

The Department's argument has little force in light of the Court of Appeals' decision in *Harmon*. The clear thrust of *Harmon* is not that existing employees have such strong privacy expectations as to overcome strong government interests in drug testing or that the opportunity to observe them is sufficient to foreclose the need for testing. *See* 878 F.2d at 489. Instead, *Harmon* rested on the court's firm rejection of the purported government interests in such testing. *Harmon* examined the three interests recognized as valid by the Supreme Court in *Von Raab*, workforce integrity, safety, and protecting sensitive information, and concluded that none of them were of value for most of the employees represented by the *Harmon* plaintiffs, including Antitrust Division attorneys without access to Top Secret information.

The Court of Appeals rejected the workforce integrity interest on the ground that "*Von Raab* . . . suggests that the government may search its employees only when a clear, direct nexus exists between the nature of the employee's duty and the nature of the feared violation." 878 F.2d at 490. *Harmon* gave as an example of where there was no such nexus with drug use the case of "an attorney who prosecutes antitrust or securities fraud

cases." 878 F.2d at 491. Plainly, then, the required nexus is lacking in Willner's case.

The Court of Appeals rejected the safety interest on the ground that an error by a Justice Department employee created only an "indirect risk . . . wholly different from the risk posed by a worker who carries a gun or operates a train." 878 F.2d at 491. Willner is not seeking a position that puts him in a position to create direct safety risks as defined by the Court of Appeals.

Finally, the Court of Appeals rejected the sensitive information interest except with respect to employees whose jobs required Top Secret clearances, reasoning that "caution should be used in approving this justification for testing." The declaration of John W. Clark, deputy director of operations for the Antitrust Division, indicates that work in the division may require access to Top Secret classified information, that two attorneys in the Communications and Finance section, where Willner has been assigned, have standing Top Secret clearances, and that others may be required to obtain such clearances on relatively short notice. Willner, however, rests on the assurances of section officials that the position he seeks "would not require" him to obtain Top Secret clearance. It is clear, then that he has made a choice to sacrifice potential opportunities within the division and any contribution he could make in sensitive cases if such assignments would require the drug testing to which he so strenuously objects.[2]

Nothing in the Court of Appeals' discussion rejecting the validity of these government interests provides any basis for arguing that the analysis should be any different in the case of a job applicant. Thus the law of

[2] The Court does not decide whether the Department could lawfully make acceptance of a Top Secret clearance, with a corresponding obligation to undergo drug testing, a condition of continued employment with the Antitrust Division.

this Circuit does not allow this Court to act on the basis of the Department's serious but generalized concerns. Nevertheless, the Court will briefly consider the distinctions between an incumbent employee and an applicant such as Willner to make certain that these factors do not require a result different from *Harmon*. The Department points to two such distinctions: (1) that an applicant has a reduced expectation of privacy compared with a job incumbent; and (2) that the government has a significantly greater need to test applicants than it has to test incumbents, whom it can observe on the job for signs of drug use.

With respect to expectations of privacy, the Department argues that an outside applicant has no genuine expectation of privacy because (1) he is informed in advance of the testing requirement and would be entitled to simply withdraw his application at that stage; (2) he is informed 48 hours in advance of the actual testing; and (3) by complying with the thorough background investigation pursuant to application, he has consented to a broad intrusion into his privacy. The Department urges that Willner in particular had no expectation of privacy because he was an attorney of record in the *Harmon* case and thus is intimately familiar with the Department's drug testing program.

The Court of Appeals has held that "a search otherwise unreasonable cannot be redeemed by a public employer's exaction of a 'consent' to the search as a condition of employment." *National Federation of Federal Employees v. Weinberger*, 818 F.2d 935, 943 (D.C.Cir. 1987). Clearly, an applicant has some expectation of privacy; in applying for a job he does not thereby consent to, for example, a warrantless search of his home.

However, as the court in *Weinberger* also stated, "[a]dvance notice of the employer's condition . . . may be taken into account as one of the factors relevant to the extent of the employee's legitimate expectation of privacy." *Id. See also Von Raab*, 109 S.Ct. at 1384 n. 2.

In *Harmon*, the Court of Appeals indicated that privacy concerns may be greater for a job holder facing random testing than for a job applicant facing mandatory screening, noting that an incumbent may lose her job if she declines testing, whereas a job applicant would only forego an opportunity. 878 F.2d at 484. Although the Court concluded that the same legal analysis was appropriate whether dealing with mandatory testing of employees applying for transfer, as in *Von Raab*, or dealing with random incumbent employee testing, it concluded that the random nature of the testing might "tip the scales" in a "particularly close case." 878 F.2d at 484.[3]

In light of the clear rejection of the government interests at issue here, this is not such a close case.[4]

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[3] *Von Raab* concerned *internal* applicants for transfer or promotion, whereas the present case deals with an outside applicant. For purposes of evaluating expectations of privacy, however, the factors deemed relevant—the testing only of those who seek new positions, the advance warning that drug testing is required, the advance notice of the actual test, and, particularly, the type of job sought, *see Von Raab*, 109 S.Ct. at 1384 n. 2, 1393-94—do not suggest that the two types of applicants be treated differently.

[4] In one recent case where the government invoked legitimate safety concerns, the applicant/employee distinction did tip the scales: Judge Thomas F. Hogan of this Court held that across-the-board Coast Guard pre-employment testing of certain merchant marine applicants was reasonable, but random testing of incumbents in those positions was not. *Transportation Institute*, 727 F.Supp. at 654-55; *see also Transportation Institute v. United States Coast Guard*, Civil Action Nos. 88-3429, 89-1519 (D.D.C. August 3, 1989) (prior opinion dealing with preliminary injunction). However, Judge Hogan noted that physical examinations and drug testing were widespread in the heavily-regulated maritime industry and that the testing of applicants was "akin to procedures encountered in the context of a regular physical examination." 727 F.Supp. at 655 (citing *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)). By contrast, pre-employment physical examinations are not required of Justice Department applicants.

Nor does the "opportunity to observe" factor, held in *Harmon* to be "surely one element to be weighed in the balance," 878 F.2d at 489, provide a sufficient basis for treating an applicant differently than an incumbent Antitrust Division attorney. In rejecting the Department's attempt to assure the integrity of its processes and a drug-free work place, the Court in *Harmon*, contrasting Justice Department employees with Customs Service workers, commented, "DOJ employees . . . work in 'traditional office environments,' in which drug use is, presumably, more easily detected by means other than urine testing." *Id.* This observation comparing employees doing dangerous field work with office workers is pertinent to analyzing the case of an Antitrust Division attorney applicant such as Willner.

The declaration of Thomas D. King, Executive Director of the Antitrust Division, describes in detail the pre-employment screening process applicable to new attorneys like Willner employed by that Division following tentative selection. An "extremely thorough" background investigation is carried out which "includes searching inquiry into numerous aspects of the applicant's personal life . . . including any past use of illegal drugs." The investigation includes fingerprinting, a detailed questionnaire,[5] a 15-year residence disclosure, employment, travel, medical and mental treatment records, police records, financial and tax data, and much else. This is supplemented by an FBI neighborhood check.

Surely this process is as likely to uncover any applicant reasonably suspected of having a drug problem as presumably occurs in a traditional office setting.[6]

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[5] Antitrust Division attorney applicants, regardless of the nature of the position sought, must complete Standard Form 86, entitled "Questionnaire for Sensitive Positions," which is widely used throughout the government.

[6] Supplementing, but not essential to, Willner's position is the fact that he, unlike many other entering Justice Department at-

The constitutional right of any citizen not to be searched without a reasonable basis of individualized suspicion is basic to our freedom. Preservation of this right was crucial to the creation of our form of government when we revolted from a system that failed to honor it. If a serious problem arises there is often a temptation to solve it by relaxing Fourth Amendment protections. Just as a beautiful sand dune crumbles if continuously eroded by ocean waves, so will this essential, precious right become a victim if it is modified at times of stress. Presumably it was this concern that led the Court of Appeals to take such a rigid position in *Harmon*, by which this Court is bound.

There is no recognized legitimate ground shown for compelling a drug test search of persons in Willner's situation. The Court holds that the requirement compelling all attorneys accepted for employment in the Department's Antitrust Division to submit to a pre-screening urine drug test in the absence of any basis for individualized suspicion of drug use offends the Fourth Amendment and is invalid as applied to Willner.[7]

Willner lacks standing to challenge all pre-employment screening by drug testing of all new Department of Justice or OBD employees. The duties and/or circumstances pertaining to some prospective employees may be found to be sufficiently sensitive or involved in public safety to establish a compelling need for intial drug testing, as might the lack of alternative means of obtaining

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torneys, comes to the job not directly from school but after a number of years of steady, full-time employment with a readily accessible local employer. There was a substantial opportunity to observe his habits and any evidence of drug use at that job.

[7] No useful purpose would be served by delaying entry of judgment for Willner. *See Kennedy v. Whitehurst*, 509 F.Supp. 226 (D.D.C.1981), *aff'd*, 690 F.2d 971 (D.C.Cir.1982); Fed.R.Civ.P. 65(a)(2).

reliable background information. *See Harmon*, 878 F.2d at 487.

An appropriate Order is attached.

ORDER

Upon consideration of plaintiff's motion for preliminary injunction, the opposition thereto, defendants' motion to dismiss or in the alternative for summary judgment, and the entire record herein, the Court having given notice to the parties at the preliminary injunction hearing that the issues being presented might be appropriate for determination on the merits pursuant to Fed.R.Civ.P. 65(a)(2), and the Court having determined that there are no genuine issues of material fact or reasons for further proceedings, it is hereby

ORDERED that defendants' motion to dismiss or in the alternative for summary judgment is denied; and it is further

ORDERED that plaintiff's motion for preliminary injunction is moot; and it is further

ORDERED that judgment is entered for the plaintiff pursuant to Fed.R.Civ.P. 65(a)(2); and it is further

ORDERED that the Department of Justice Offices, Boards and Divisions drug testing plan ("OBD revised plan"), as applied to plaintiff, violates his rights under the Fourth Amendment to the United States Constitution; and it is further

ORDERED that, in the absence of reasonable grounds for individualized suspicion of drug involvement, defendants are hereby permanently enjoined from implementing or enforcing the requirements of pre-employment drug testing, pursuant to the OBD revised plan or otherwise, of attorneys applying for employment with the Antitrust Division, unless the attorney applicant will be required

immediately to have access to Top Secret classified information; and it is further

ORDERED that defendants are hereby permanently enjoined from taking any adverse action against plaintiff by reason of his participation in this litigation or his refusal to take a urine test during pre-employment screening of his application for employment.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-0535

CARL WILLNER,
Plaintiff,

v.

RICHARD L. THORNBURGH, *et al.*,
Defendants.

ORDER

Upon consideration of defendants' Motion to Amend Judgment, the opposition thereto, and the entire record herein, it is hereby

ORDERED that the motion is denied.

/s/ Gerhard A. Gesell
United States District Judge

May 29, 1990.

Federal Register, Vol. 51, No. 180
Wednesday, September 17, 1986

PRESIDENTIAL DOCUMENTS

Executive Order 12564 of September 15, 1986

Drug-Free Federal Workplace

I, RONALD REAGAN, President of the United States of America, find that:

Drug use is having serious adverse effects upon a significant proportion of the national work force and results in billions of dollars of lost productivity each year;

The Federal government, as an employer, is concerned with the well-being of its employees, the successful accomplishment of agency missions, and the need to maintain employee productivity;

The Federal government, as the largest employer in the Nation, can and should show the way towards achieving drug-free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace;

The profits from illegal drugs provide the single greatest source of income for organized crime, fuel violent street crime, and otherwise contribute to the breakdown of our society;

The use of illegal drugs, on or off duty, by Federal employees is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust placed in such employees as servants of the public;

Federal employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs;

The use of illegal drugs, on or off duty, by Federal employees impairs the efficiency of Federal departments and agencies, undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively. The use of illegal drugs, on or off duty, by Federal employees also can pose a serious health and safety threat to members of the public and to other Federal employees;

The use of illegal drugs, on or off duty, by Federal employees in certain positions evidences less than the complete reliability, stability, and good judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law; and

Federal employees who use illegal drugs must themselves be primarily responsible for changing their behavior and, if necessary, begin the process of rehabilitating themselves.

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 3301(2) of Title 5 of the United States Code, section 7301 of Title 5 of the United States Code, section 290ee-1 of Title 42 of the United States Code, deeming such action in the best interests of national security, public health and safety, law enforcement and the efficiency of the Federal service, and in order to establish standards and procedures to ensure fairness in achieving a drug-free Federal workplace and to protect the privacy of Federal employees, it is hereby ordered as follows:

Section 1. *Drug-Free Workplace.*

(a) Federal employees are required to refrain from the use of illegal drugs.

(b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.

(c) Persons who use illegal drugs are not suitable for Federal employment.

Sec. 2. *Agency Responsibilities.*

(a) The head of each Executive agency shall develop a plan for achieving the objective of a drug-free workplace with due consideration of the rights of the government, the employee, and the general public.

(b) Each agency plan shall include:

(1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;

(2) Employee Assistance Programs emphasizing high level direction, education, counseling, referral to rehabilitation, and coordination with available community resources;

(3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees;

(4) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues; and

(5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis in accordance with this Order.

Sec. 3. *Drug Testing Programs.*

(a) The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing shall be de-

termined by the head of each agency, based upon the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.

(b) The head of each Executive agency shall establish a program for voluntary employee drug testing.

(c) In addition to the testing authorized in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an employee for illegal drug use under the following circumstances:

(1) When there is a reasonable suspicion that an employee uses illegal drugs;

(2) In an examination authorized by the agency regarding an accident or unsafe practice; or

(3) As part of or as a follow-up to counseling or rehabilitation for illegal drug use through an Employee Assistance Program.

(d) The head of each Executive agency is authorized to test any applicant for illegal drug use.

Sec. 4. *Drug Testing Procedures.*

(a) Sixty days prior to the implementation of a drug testing program pursuant to this Order, agencies shall notify employees that testing for use of illegal drugs is to be conducted and that they may seek counseling and rehabilitation and inform them of the procedures for obtaining such assistance through the agency's Employee Assistance Program. Agency drug testing programs already ongoing are exempted from the 60-day notice requirement. Agencies may take action under section 3(c) of this Order without reference to the 60-day notice period.

(b) Before conducting a drug test, the agency shall inform the employee to be tested of the opportunity to submit medical documentation that may support a legitimate use for a specific drug.

(c) Drug testing programs shall contain procedures for timely submission of requests for retention of records and specimens; procedures for retesting; and procedures, consistent with applicable law, to protect the confidentiality of test results and related medical and rehabilitation records. Procedures for providing urine specimens must allow individual privacy, unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided.

(d) The Secretary of Health and Human Services is authorized to promulgate scientific and technical guidelines for drug testing programs, and agencies shall conduct their drug testing programs in accordance with these guidelines once promulgated.

Sec. 5. *Personnel Actions.*

(a) Agencies shall, in addition to any appropriate personnel actions, refer any employee who is found to use illegal drugs to an Employee Assistance Program for assessment, counseling, and referral for treatment or rehabilitation as appropriate.

(b) Agencies shall initiate action to discipline any employee who is found to use illegal drugs, *provided that* such action is not required for an employee who:

(1) Voluntarily identifies himself as a user of illegal drugs or who volunteers for drug testing pursuant to section 3(b) of this Order, prior to being identified through other means;

(2) Obtains counseling or rehabilitation through an Employee Assistance Program; and

(3) Thereafter refrains from using illegal drugs.

(c) Agencies shall not allow any employee to remain on duty in a sensitive position who is found to use illegal drugs, prior to successful completion of rehabilitation through an Employee Assistance Program. However, as part of a rehabilitation or counseling program, the head of an Executive agency may, in his or her discretion, allow an employee to return to duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or the national security.

(d) Agencies shall initiate action to remove from the service any employee who is found to use illegal drugs and:

(1) Refuses to obtain counseling or rehabilitation through an Employee Assistance Program; or

(2) Does not thereafter refrain from using illegal drugs.

(e) The results of a drug test and information developed by the agency in the course of the drug testing of the employee may be considered in processing any adverse action against the employee or for other administrative purposes. Preliminary test results may not be used in an administrative proceeding unless they are confirmed by a second analysis of the same sample or unless the employee confirms the accuracy of the initial test by admitting the use of illegal drugs.

(f) The determination of an agency that an employee uses illegal drugs can be made on the basis of any appropriate evidence, including direct observation, a criminal conviction, administrative inquiry, or the results of an authorized testing program. Positive drug test results may be rebutted by other evidence that an employee has not used illegal drugs.

(g) Any action to discipline an employee who is using illegal drugs (including removal from the service, if appropriate) shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act.

(h) Drug testing shall not be conducted pursuant to this Order for the purpose of gathering evidence for use in criminal proceedings. Agencies are not required to report to the Attorney General for investigation or prosecution any information, allegation, or evidence relating to violations of Title 21 of the United States Code received as a result of the operation of drug testing programs established pursuant to this Order.

Sec. 6. *Coordination of Agency Programs.*

(a) The Director of the Office of Personnel Management shall:

(1) Issue government-wide guidance to agencies on the implementation of the terms of this Order;

(2) Ensure that appropriate coverage for drug abuse is maintained for employees and their families under the Federal Employees Health Benefits Program;

(3) Develop a model Employee Assistance Program for Federal agencies and assist the agencies in putting programs in place;

(4) In consultation with the Secretary of Health and Human Services, develop and improve training programs for Federal supervisors and managers on illegal drug use; and

(5) In cooperation with the Secretary of Health and Human Services and heads of Executive agencies, mount an intensive drug awareness campaign throughout the Federal work force.

(b) The Attorney General shall render legal advice regarding the implementation of this Order and shall be consulted with regard to all guidelines, regulations, and policies proposed to be adopted pursuant to this Order.

(c) Nothing in this Order shall be deemed to limit the authorities of the Director of Central Intelligence under the National Security Act of 1947, as amended, or the statutory authorities of the National Security Agency or

the Defense Intelligence Agency. Implementation of this Order within the Intelligence Community, as defined in Executive Order No. 12333, shall be subject to the approval of the head of the affected agency.

Sec. 7. *Definitions.*

(a) This Order applies to all agencies of the Executive Branch.

(b) For purposes of this Order, the term "agency" means an Executive agency, as defined in 5 U.S.C. 105; the Uniformed Services, as defined in 5 U.S.C. 2101(3) (but excluding the armed forces as defined by 5 U.S.C. 2101(2)); or any other employing unit or authority of the Federal government, except the United States Postal Service, the Postal Rate Commission, and employing units or authorities in the Judicial and Legislative Branches.

(c) For purposes of this Order, the term "illegal drugs" means a controlled substance included in Schedule I or II, as defined by section 802(6) of Title 21 of the United States Code, the possession of which is unlawful under chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

(d) For purposes of this Order, the term "employee in a sensitive position" refers to:

(1) An employee in a position that an agency head designates Special Sensitive, Critical-Sensitive, or Noncritical-Sensitive under Chapter 731 of the Federal Personnel Manual or an employee in a position that an agency head designates as sensitive in accordance with Executive Order No. 10450, as amended;

(2) An employee who has been granted access to classified information or may be granted access to classified information pursuant to a determination of trustworthiness by an agency head under Section 4 of Executive Order No. 12356;

(3) Individuals serving under Presidential appointments;

(4) Law enforcement officers as defined in 5 U.S.C. 8331(20); and

(5) Other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

(e) For purposes of this Order, the term "employee" means all persons appointed in the Civil Service as described in 5 U.S.C. 2105 (but excluding persons appointed in the armed services as defined in 5 U.S.C. 2102(2)).

(f) For purposes of this Order, the term "Employee Assistance Program" means agency-based counseling programs that offer assessment, short-term counseling, and referral services to employees for a wide range of drug, alcohol, and mental health programs that affect employee job performance. Employee Assistance Programs are responsible for referring drug-using employees for rehabilitation and for monitoring employees' progress while in treatment.

Sec. 8. *Effective Date.* This Order is effective immediately.

/s/ Ronald Reagan

THE WHITE HOUSE,
September 15, 1986.

Editorial note: For the President's remarks of September 15 on signing EO 12564, see the *Weekly Compilation of Presidential Documents* (vol. 22, no. 38).

DEPARTMENT OF JUSTICE
DRUG-FREE WORKPLACE PLAN [1]

CERTIFIED

Dated: September 25, 1987

Amendments Approved: December 17, 1987

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[1] Amended pursuant to Inter-Agency Coordinating Group Requirements for Certification under Section 503 of the Supplemental Appropriations Act of 1987, Pub. L. 100-71, 101 Stat. 391, 468-471, codified at 5 U.S.C. § 7301 note (1987).

CHAPTER 1.

GENERAL PROVISIONS

A. *Purpose*

This order:

a. Declares that the use of illegal drugs by all Department of Justice (DOJ) employees, on or off duty, will not be tolerated;

b. Establishes the DOJ Drug-Free Workplace Plan, required under Section 2(b) of Executive Order 12564, consistent with Section 503 of the Supplemental Appropriations Act of 1987, Pub. L. 100-71, 101 Stat. 391, 468-471, codified at 5 U.S.C. § 7301 note (1987), (hereafter cited as "the Act");

c. Sets forth objectives, policies and implementation guidelines for the DOJ Drug-Free Workplace Plan; and,

d. Provides procedures to govern implementation of the Plan including procedures to identify illegal drug users through drug testing on a controlled and carefully monitored basis.

B. *Background*

On September 15, 1986, the President signed Executive Order 12564, Drug-Free Federal Workplace, establishing a policy against the use of illegal drugs by Federal employees, whether on duty or off duty. In a letter to all executive branch employees dated October 4, 1986, the President reiterated his goal of ensuring a safe and drug-free workplace for all federal workers.

The Executive Order recognized that illegal drug use is seriously impairing a portion of the national work force, resulting in the loss of billions of dollars each year. As the largest employer in the nation, the federal government has a compelling proprietary interest in establishing reasonable conditions of employment. Pro-

hibiting employee drug use is one such condition. The DOJ is concerned with the well-being of its employees, the successful accomplishment of agency missions, and the need to maintain employee productivity. The intent of the policy is to offer a helping hand to those who need it, while sending a clear message that any illegal drug drug use is, quite simply, incompatible with federal service.

On July 11, 1987, Congress passed legislation affecting implementation of the Executive Order under Section 503 of the Act, in an attempt to establish consistency among federal agency drug testing plans, reliable and accurate drug testing, employee access to drug testing records, confidentiality of drug testing results, and continued, centralized oversight of the Federal Government's drug testing program. Although the Bureau of Prisons, Drug Enforcement Administration, Federal Bureau of Investigation, and Immigration and Naturalization Service are exempt from complying with this Act under § 503(b)(1)(D), the Offices, Boards, Litigating Divisions and U.S. Marshals are not exempt under that provision.

The DOJ, as a result of its law enforcement responsibilities, as well as the sensitive nature of its work, has an especialy compelling obligation to eliminate illegal drug use from its workplace. Employees who work for an agency whose mission is to uphold and enforce the law, should not themselves violate the law.

The DOJ has a compelling interest, for example, in ensuring that employees of the Bureau of Prisons are drug-free in order to maintain a drug-free federal prison system.

Similarly, the Drug Enforcement Administration has a compelling interest in ensuring that its agents—who enforce drug interdiction laws—will themselves be drug-free.

Likewise, employees of the Federal Bureau of Investigation must foster public trust by earning and sustain-

ing their reputation for integrity and honesty. Particularly in view of the FBI's law enforcement and national security responsibilities, illegal drug use is wholly incompatible with the FBI mission and purpose.

Equally significant, the United States Marshals Service is responsible for maintaining security and order in our nation's federal courts, as well as for protecting witnesses.

The Immigration and Naturalization Service has law enforcement responsibilities for controlling our nation's borders and apprehending and interdicting illegal drugs and criminal aliens as they enter the country.

Finally, attorneys with the DOJ hold positions of high public trust requiring them, as a condition of employment and as a measure of their position sensitivity, to pass full-field FBI background investigations before permanent offers of employment are extended. Moreover, they have access to classified and other sensitive information.

The mark of a successful drug-free workplace program depends on how well the Department can inform its employees of the hazards of drug use, and on how much assistance it can provide drug users. Equally important is the assurance to employees that personal dignity and privacy will be respected in reaching the Department's goal of a drug-free workplace. Therefore, this plan includes policies and procedures for: (1) employee assistance; (2) supervisory training; (3) employee education; and (4) identification of illegal drug use through drug testing on a carefully controlled and monitored basis.

C. *Nature, Frequency, and Type of Drug Testing to be Instituted*

Section 503 of the Act requires the DOJ Plan to specify the nature, frequency, and type of drug testing to be instituted. The DOJ Plan includes the following types

of drug testing: (1) Applicant testing; (2) Random testing of sensitive employees in testing designated positions; (3) Reasonable suspicion testing; (4) Accident or unsafe practice testing; (5) Voluntary testing, and (6) Testing as part of or as a follow-up to counseling or rehabilitation.

The frequency of testing for random testing, voluntary testing, and follow-up testing is specified in each non-exempt Component Plan. The Attorney General reserves the right to increase or decrease the frequency of testing based on the Department's mission, availability of resources, and experience in the program, consistent with the duty to achieve a drug free workplace under the Executive Order.

D. *Drugs for Which Individuals Are Tested*

Section 503 of the Act requires the Offices Boards and Litigating Division (hereafter "OBDs") and the U.S. Marshals Service (hereafter "USMS") to specify the drugs for which individuals in the OBDs and USMS shall be tested. These are listed in those Component Plans.

E. *Scope*

This order shall be effective for the Federal Bureau of Investigation, the Drug Enforcement Administration, the Bureau of Prisons and the Immigration and Naturalization Service immediately. These DOJ components shall ensure that their drug testing programs implemented under this order comply with the mandatory guidelines published under § 503(a)(1)(A)(ii) of the Act, no later than 90 days after such mandatory guidelines take effect, except that any judicial challenge that affects such guidelines should not affect drug testing programs or plans subject to this paragraph.

When each Executive Branch agency as specified in Section 503(a)(2) of the Act has complied with the pro-

visions of Section 503(a) of the Act, this Order shall be effective immediately for all other components of the Department, including each the OBD Office, Board and Division as defined in Chapter 1.H.3 of this order.

F. *Union Cooperation*

The active participation and support of labor organizations can contribute to the success of this program. Components shall seek ways in which recognized bargaining unit representatives might assist in program implementation, such as in acquainting employees with rehabilitation facilities and by enhancing employee confidence in the program. Components shall continue to observe agreements already reached, include union representatives in general orientation programs, and continue to meet all obligations under Title VII of the Civil Service Reform Act of 1978.

G. *Supervisory Training*

Training will be provided for supervisors to assist in identifying and addressing illegal drug use by employees. Training may be accomplished through various means, including contracting out to private organizations, HHS courses, in-house training courses, and employee assistance program training in cooperation with designated EAP Administrators in the FBI, BOP, DEA, INS, U.S. Marshals and Justice Management Division, or other designated individual(s). Training will include information regarding referral of employees to the EAP, procedures and requirements for drug testing and signs of possible drug use. Such training will also include information to make supervisors more sensitive to employee drug behavior and help supervisors recognize and document facts that give rise to a reasonable suspicion that an employee may be using illegal drugs.

H. *Definitions*

1. Terms. Wherever appropriate, terms used are the same as terms used in the FPM Letter 792-16 and in the *HHS Guidelines.*

2. Component Heads refers to the following organizational heads:

Director, Federal Bureau of Investigation;

Administrator, Drug Enforcement Administration;

Director, Bureau of Prisons;

Commissioner, Immigration and Naturalization Service;

Director, United States Marshals Service; and

Assistant Attorney General for Administration (for all offices, boards and divisions).

3. Offices, Boards, and Divisions as used in this order refers to the organizations listed under those titles in 28 C.F.R. 0.1, including the U.S. Attorneys' Offices, together with any DOJ organizations not part of INS, DEA, FBI, USMS or BOP.

4. Illegal Drugs means a controlled substance included in Schedule I or II, as defined by section 802(6) of Title 21 of the United States Code, the possession of which is unlawful under chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

5. Management Official means an individual employed by DOJ in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of DOJ. 5 U.S.C. § 7103(a)(11).

6. Medical Review Official means the individual responsible for receiving laboratory results generated from the

DOJ Drug-Free Workplace Program who is a licensed physician with knowledge of substance abuse disorders and the appropriate medical training to interpret and evaluate all positive test results together with an individual's medical history and any other relevant biomedical information.

7. Random Testing means mandatory testing imposed without individualized suspicion that a particular individual is using illegal drugs. Random testing includes either uniform-unannounced testing of every employee occupying a testing designated position or a statistically random sampling of individuals occupying testing designated positions based on a neutral criterion, such as social security numbers.

8. Employees in Sensitive Positions means: (1) employees in positions designated by the Component head as Special Sensitive, Critical Sensitive, or Noncritical-Sensitive under Chapter 731 of the Federal Personnel Manual, or employees in positions designated by the Component Head as sensitive in accordance with Executive Order No. 10450, as amended; (2) employees granted access to classified information pursuant to a determination of trustworthiness by the Attorney General under Section 4 of Executive Order No. 12356; (3) individuals serving under Presidential appointments; (4) law enforcement officers as defined in 5 U.S.C. § 8331(20), and 8401(17); or (5) Other [sic] positions that the Attorney General determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

9. Supervisor means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely rou-

tine or clerical in nature, but requires the consistent exercise of independent judgment. 5 U.S.C. § 7103 (a)(10).

10. Testing Designated Positions means positions which have been designated for random testing pursuant to the procedures in Chapter 4.B of this Order. Employees occupying "sensitive" positions additionally must be designated as occupying "testing designated positions" before random testing of their position may commence.

11. Verified Positive Test Result means a test result that has been screened positive by an FDA-approved immunoassay test, confirmed by a Gas Chromatography/Mass Spectrometry assay, (or other confirmatory tests approved by HHS), evaluated by the Medical Review Official and determined by his to be unjustified under Section 6.E. of this order.

J. *References*

1. Authorities

   a. Executive Order 12564;

   b. Executive Order 10450;

   c. Executive Order 12356;

   d. Section 503 of the Supplemental Appropriations Act of 1987, Pub. L. 100-71, 101 Stat. 391, 468-471, codified at 5 U.S.C. § 7301 note (1987);

   e. Scientific and Technical Guidelines For Drug Testing Programs, Alcohol, Drug Abuse and Mental Health Administration (ADAMHA), Department of Health and Human Services (HHS), as amended;

   f. Standards for Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies, Alcohol, Drug Abuse and Mental Health Administration (ADAMHA), Department of Health and Human Services (HHS), as amended;

g. Civil Service Reform Act of 1978, P. L. 95-454;

h. 42 CFR Part 2, establishing requirements for assuring the confidentiality of alcohol and drug-abuse patient treatment records;

i. The Privacy Act of 1974 (5 U.S.C. Section 552a), prescribing requirements governing the maintenance of records by agencies pertaining to the individuals and access to these records by the individual(s) to whom they pertain;

j. 49 CFR Part 10, implementing the Privacy Act of 1974 within the DOJ;

k. Federal Employees Substance Abuse Education and Treatment Act of 1986, P.L. 99-570.

2. Guidance

a. Office of Personnel Management (OPM), Federal Personnel Manual (FPM) Letters 792-16 (November 28, 1986), and 792-17 (March 9, 1987), setting forth guidelines for Federal civilian agencies in establishing a drug-free workplace pursuant to Executive Order 12564;

b. FPM Chapter 792, Federal Health and Counseling Programs, providing guidance to Federal agencies in establishing alcoholism and drug abuse programs (subchapter 5) and employee counseling services programs (subchapter 6) for Federal employees with alcohol or drug problems;

c. FPM Supplement, Chapter 792-2, providing guidance for developing and maintaining appropriate prevention, treatment and rehabilitation programs and services for alcoholism and drug abuse among Federal employees; and

d. DOJ Order 1792.1, May 15, 1978, and related authorities.

CHAPTER 2.

NOTICE

A. *General Notice*

Section 4(a) of the Executive Order requires agencies to notify all employees of the testing program. The Attorney General has authorized each Component Head to issue a general notice to all employees within each respective component announcing the testing program of that component. Component Heads of the BOP, DEA, FBI, and INS, shall ensure that the general notices are provided to all their employees no later than sixty (60) days prior to the implementation date of a component plan. All other Component Heads shall provide general notices to their respective employees upon completion of the congressional certification procedures pursuant to §§ 503(a)(1)(A), 503(a)(1)(B), and 503(a)(1)(C) of the Act. Each notice shall:

a. Explain briefly the purpose of the Drug-Free Workplace Plan;

b. Notify all employees within the Component that the Drug-Free Workplace Plan will include both voluntary and mandatory testing;

c. Notify employees that those who hold positions selected for random testing will also receive an individual notice, prior to the commencement of testing, indicating that their position has been designated a "test designated position."

d. Inform employees that they may seek counseling and rehabilitation and inform them of the procedures for obtaining such assistance through Employee Assistance Program Administrators (EAP's) available to Component employees;

B. *Individual Notice*

Once designated by the Component Head pursuant to the procedures in Chapter 4.B. of this Order, Component Heads shall distribute individual notices to those employees in a sensitive position designated for random testing in the Component prior to the commencement of such testing. The notice will:

a. Notify specific Component employees that their position has been designated a "test designated position;"

b. Explain briefly the purpose of the Drug-Free Workplace Plan;

c. Describe the circumstances under which testing may occur;

d. Indicate that positive test results verified by the Medical Review Officer will be protected under the provisions of the Privacy Act, 5 U.S.C. § 552a and for non-exempt Components under § 503(e) of the Act, and that medical and rehabilitation records will be deemed confidential "patient" records that will be disclosed only in accordance with the prior written consent of the patient with respect to whom such record is maintained;

e. Indicate that the confirmatory test is highly reliable and difficult to dispute;

f. State the consequences of both confirmed positive test results and refusal to be tested;

g. Indicate that opportunity will be afforded to submit medical documentation of lawful use of an otherwise illegal drug;

h. Indicate that opportunity will be afforded the employee voluntarily to identify himself as a user of illegal drugs and to receive counseling or rehabilitation, in which case disciplinary action is not required;

i. Announce that employees may seek counseling and rehabilitation and inform them of the procedures for obtaining such assistance through specified Employee Assistance Programs (EAP's), available to Component employees;

C. *Signed Acknowledgment*

Each employee in a testing designated position will be asked to acknowledge in writing that the employee has received and read the notice that the employee's position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal. Each notice will be signed by the employee and centrally collected for easy retrieval by the Component Head.

If the employee refuses to sign the acknowledgement, the employee's supervisor shall note on the acknowledgement form that the employee received the notice. This acknowledgement is advisory only. An employee's failure to sign the notice shall not preclude testing that employee, or otherwise affect the implementation of this order since the general sixty-day notice will previously have notified all DOJ employees of the requirement to be drug-free.

Notwithstanding any other provision in this DOJ Drug-Free Workplace Plan, the FBI is not required to issue general or individual notices to FBI employees who remain subject to the FBI drug testing program promulgated before September 15, 1986. However, all Component Heads, including the FBI, shall provide every new DOJ employee as part of the regular personnel orientation program notice of the DOJ Drug-Free Workplace Plan.

D. *Administrative Relief*

If an employee believes his or her position has been wrongly classified a testing designated position (TDP),

that employee may file an administrative appeal to the designated DOJ official who has authority to remove the employee from the TDP list. The appeal must be submitted by the employee, in writing, to the designated official within 15 days of notification, setting forth all relevant information. The designated official shall review the appeal based upon the criteria applied in designating that employee's position as a TDP. The official's decision is final and is not subject to further review.

CHAPTER 3.

PROGRAM ADMINISTRATION

A. *Component Heads*

Component Heads are responsible for the implementation of the Drug-Free Workplace Plan within their component and for adherence to all requirements of Executive Order 12564 and § 503 of the Act. Each Component Head will assure that the following aspects of the Drug-Free Workplace Plan are efficiently and effectively accomplished in accordance with this order and all other applicable regulations.

B. *Field Implementation*

Each Component shall develop implementation procedures to enable DOJ field offices efficiently and swiftly to implement all aspects of this order, taking into account the unique geographical, personnel, budgetary and other relevant factors of the field offices.

Such procedures shall permit field office implementation to proceed independently of headquarters implementation. Testing may proceed under this order as soon as any field office or operating site is prepared to commence testing, and without regard to whether any other field office or operating site or headquarters is prepared to commence testing.

Such procedures shall also encourage cooperation and coordination among components so as to conserve resources and efficiently implement this order.

C. *Drug Program Coordinator*

Each Component shall have a Drug Program Coordinator (DPC) assigned to carry out the purposes of this plan. The DPC shall be responsible for implementing, directing, administering, and managing the drug program within the Component. The DPC shall serve as the principal contact with the laboratory in assuring the effective operation of the testing portion of the program. In carrying out this responsibility, the DPC shall, among other duties:

1. Arrange for all testing authorized under this order;
2. Insure that all employees subject to random testing receive individual notice as described in Section 1 (H) of this Plan, prior to implementation of the program, and that such employees return a signed acknowledgment of receipt form;
3. Document, through written inspection reports, all results of laboratory inspections conducted;
4. Coordinate with and report to the Component Head on DPC activities and findings that may affect the reliability or accuracy of laboratory results;
5. Ensure that the means of random selection in the random testing program remains confidential;
6. Evaluate periodically whether the numbers of employees tested and the frequency with which those tests will be administered satisfy DOJ's duty to achieve a drug-free work force;
7. In coordination with the EAP Administrator, publicize and disseminate drug program educational materials, and oversee training and education sessions regarding drug use and rehabilitation; and

8. Coordinate all DPC duties in field offices wherever possible to conserve resources and to efficiently and speedily accomplish reliable and accurate testing objectives.

D. *Procurement and Contract Administration*

Wherever existing facilities are inadequate to implement this order, the Component head shall:

1. Act as Contracting Officer for the administration of all related contracts;

2. Ensure that contractors chosen to perform the drug screening tests are duly certified pursuant to the HHS guidelines and that all contracts conform to the technical specifications of the HHS guidelines; and

3. Establish, by contract or with DOJ employees as deemed appropriate, the positions and specific responsibilities of the DPC and the MRO as required by the HHS guidelines.

E. *Medical Review Official*

Each Component shall have an MRO assigned to carry out the purposes of this Order. The MRO shall, among other duties:

1. Receive all laboratory test results;

2. Assure that an individual who has tested positive has been afforded an opportunity to justify the test result in accordance with Chapter 4.I of this Plan;

3. Consistent with confidentiality requirements, refer written determinations regarding all verified positive test results to the appropriate component official, including a positive drug test result form indicating that the positive result is "unjustified," together with all relevant documentation and a summary of findings;

4. Confirm with the appropriate personnel official whether an individual who has been tentatively selected for employment with the DOJ has obtained a verified positive test result;

5. Coordinate with and report to the Component Head on all activities and findings on a regular basis;

6. Coordinate all DPC duties in field offices wherever possible to conserve resources and to efficiently and speedily accomplish reliable and accurate testing objectives.

F. *Employee Assistance Program Administrator*

The FBI, DEA, BOP, INS, U.S. Marshals and Justice Management Division each have existing Employee Assistance Program Administrators. Among other duties, each Component's EAP shall:

(1) Provide counseling-referral and treatment-referral services to employees referred by themselves or through administrative channels for illegal drug use and monitor their progress after rehabilitation;

(2) Conferring with the Component Head, the MRO and the employee's supervisors, as appropriate;

(3) Provide educational materials and training to managers, supervisors, and employees on illegal drugs in the workplace, including training on reasonable suspicion testing;

(4) Assist supervisors with performance and/or personnel problems that may be related to illegal drug use;

(5) Ensure that EAP is not involved in the collection of urine samples or the initial reporting of test results; and

(6) Ensure that confidentiality of test results and related medical treatment and rehabilitation records

is maintained in accordance with Chapter 5 of this order.

G. *Supervisors*

Supervisors will be trained to recognize and address illegal drug use by employees, and will be provided information regarding referral of employees to the EAP, procedures and requirements for drug testing, and behavioral patterns that give rise to a reasonable suspicion that an employee may be using illegal drugs. Except as modified by the Component Head to suit specific program responsibilities, first-line supervisors shall:

1. Attend training sessions on illegal drug-use in the workplace;
2. Initiate a reasonable suspicion test, after first making appropriate factual observations and documenting those observations and obtaining approval from the second-line supervisor;
3. Refer employees to the EAP for assistance in obtaining counseling and rehabilitation, upon a finding of illegal drug use;
4. Initiate appropriate disciplinary action upon a finding of illegal drug use; and
5. In conjunction with personnel specialists, assist higher-level supervisors and the EAP Administrator in evaluating employee performance and or personnel problems that may be related to illegal drug use.

A higher-level supervisor shall review and concur, in advance, with all reasonable suspicion tests ordered under his or her supervision.

H. *Disciplinary Proposing and Deciding Officials*

Disciplinary Proposing and Deciding Officials are responsible for:

1. Receiving all relevant evidence regarding verified positive test results; and
2. Taking appropriate disciplinary action consistent with the Executive Order and with DOJ order 1752.1A, "Discipline and Adverse Actions."

CHAPTER 4

IMPLEMENTATION REQUIREMENTS

A. *Selection of Individuals for Drug Screening Testing*

Upon the appropriate effective date of implementation, individuals may be selected for testing in the following categories:

1. Random Testing. Any sensitive DOJ employee who holds a testing designated position is subject to random testing. In addition to being subject to random testing, any probationary employee in a sensitive position may be directed to take a drug test during probation before an offer of permanent employment will be extended.
2. Voluntary Testing. Employees not in testing designated positions may volunteer for unannounced random testing by notifying the DPC. These employees will then be included in the pool of testing designated positions subject to random testing, and be subject to the same conditions and procedures applicable to random testing. Volunteers shall remain in the TDP pool for the duration of the position which the employee holds, or until the employee withdraws from participation by notifying the DPC.
3. Reasonable Suspicion Testing. Reasonable suspicion testing may be based upon, among other things:
   (1) Observable phenomena, such as direct observation of drug use or possession and or the physical symptoms of being under the influence of a drug;

(2) A pattern of abnormal conduct or erratic behavior;

(3) Arrest or conviction for a drug-related offense; or the identification of an employee as the focus of a criminal investigation into illegal drug possession, use, or trafficking;

(4) Information provided either by reliable and credible sources or independently corroborated; or

(5) Evidence that the employee has tampered with a previous drug test.

Although reasonable suspicion testing does not require certainty, mere "hunches" are not sufficient to meet this standard.

4. Accident or Unsafe Practice Testing. Any employee involved in an accident or unsafe practice while on duty may be directed to take a drug test as part of an authorized examination into the accident or unsafe practice, and pursuant to criteria established by the Component Head.

5. Follow-up Testing. All employees referred through administrative channels who undergo counseling or rehabilitation programs for illegal drug use will be subject to unannounced testing following completion of such a program for a period of one year. Such employees shall be tested at the amount stipulated in the abeyance contract, or, in the alternative, at a uniform increased frequency set by the Component Head. Such testing is distinct from testing which may be imposed as a component of EAP.

6. Applicant Testing. Drug testing is required for all individuals who are tentatively selected for DOJ employment at the commencement of authorized testing. Individuals seeking appointments to other sensitive DOJ positions may also be subjected to

applicant testing. Upon the commencement of authorized testing, each Component Head shall ensure:

(a) That every DOJ vacancy announcement shall contain the following announcement: "All applicants for this position will be required to submit to urinalysis to screen for illegal drug use prior to appointment;" although failure of the announcement to contain this notice will not preclude testing if advance written notice is provided applicants in some other fashion;

(b) That each individual who is tentatively selected for a position will be notified that appointment to the position will be contingent upon the receipt of a negative drug test result; and

[(c)] That applicants to be tested shall be directed to an appropriate collection facility, and tested as soon after notification as possible, but no less than within 48 hours of notice. Where appropriate, applicants may be reimbursed for reasonable travel expenses.

B. *Designating the Testing Designated Position*

The Executive Order requires random testing for employees in sensitive positions that have been designated as testing designated positions. Each Component Head additionally must determine which Component employees in sensitive positions occupy a testing designated position that will be randomly tested. Except for the BOP, DEA, FBI, and INS, each Component Head must specify the criteria and procedures to be applied in designating positions for drug testing, including the justification for such criteria and procedures as required under Section 503 of the Act. A position will be deemed "testing designated" when the Attorney General approves either:

1. A written Component Plan submitted by the Component Head, which Plan lists or otherwise describes the testing designated positions;

2. A specific position or positions submitted by the Component Head after the submission of that Component Head's initial Plan.

Among the factors the Component Head shall consider in determining a testing designated position, are the extent to which the Component—

1. Considers its mission inconsistent with illegal drug use;
2. Is engaged in law enforcement;
3. Must foster public trust by preserving employee reputation for integrity, honesty and responsibility;
4. Has national security responsibilities;
5. Has drug interdiction responsibilities; or

The extent to which the position considered—

1. Authorizes employees to carry firearms;
2. Gives employees access to sensitive information;
3. Authorizes employees to engage in law enforcement;
4. Requires employees, as a condition of employment, to obtain a security clearance;
5. Requires employees to engage in activities affecting public health or safety;
6. Involves the prosecution of criminal cases;
7. Includes access to a controlled substance as defined by Section 802(6) of Title 21 of the United States Code; or
8. Involves the conduct of or access to grand jury proceedings.

The Attorney General reserves the right to add or delete positions determined to be testing designated positions pursuant to the criteria established in the Executive Order and this Plan. Moreover, pursuant to 42

U.S.C. 290ee-1(b)(2), and the pertinent provisions of the Federal Personnel Manual, the Attorney General has determined that all positions which have been or will be designated as testing designated positions under this plan are "sensitive positions," and are therefore exempted from coverage under 42 U.S.C. 290ee-1(b)(1) for Federal civilian employment or a Federal professional or other license or right solely on the basis of prior drug abuse.

C. *Notification of Selection*

Notification to employees of selection for random testing will be pursuant to procedures designed to:

1. Ensure that employees will not have premature notice that they have been randomly selected to be tested;

2. Allow for prompt rescheduling of employees randomly selected, but who obtain a legitimate deferral.

In any event, notification will occur the same day, preferably within two hours, of the scheduled testing.

D. *Deferral of Testing*

An employee selected for random drug testing may obtain a deferral of testing if the employee's first-line and second-line supervisors concur that a compelling need necessitates a deferral on the grounds that the employee is:

1. In a leave status (sick, annual, administrative or leave without pay);

2. In official travel status away from the test site or is about to embark on official travel scheduled prior to testing notification;

An employee whose random drug test is deferred will be subject to an unannounced test within the following 60 days.

E. *Failure to Appear for Testing*

Failure to appear for testing without a deferral will be considered refusal to participate in testing, and will subject an employee to the range of disciplinary actions, including dismissal, and an applicant to the cancellation of an offer of employment. Employees will be advised of the possibility that disciplinary action will occur if they refuse to participate in the testing. If an employee fails to appear at the collection site at the assigned time, the collector shall contact the DPC to obtain guidance on action to be taken.

F. *Notice to Employees Tested Under Specific Conditions*

Employees tested pursuant to reasonable suspicion testing, accident or unsafe practice testing, or follow-up testing, must receive notice that they will be tested and the reason for such testing. Notification will occur the same day, preferably within two hours, of the scheduled testing.

G. *Technical Guidelines for Drug Testing*

The DOJ will adhere to all scientific and technical guidelines for drug testing programs promulgated by HHS consistent with the authority granted by E.O. 12564 and with the provisions of § 503 of the Act. To the extent that any of the procedures specified in this section are inconsistent with any of those specified in the Scientific and Technical Guidelines promulgated by the Department of Health and Human Services, or any subsequent amendment thereto, such HHS Guidelines or amendment shall supersede the procedures specified in this section, but only to the extent of the inconsistency.

H. *Privacy in Drug Testing*

The employee or applicant to be tested will provide his or her sample in a rest room stall or similar enclosure so that the employee is not being observed while providing the sample. Observation is permitted, however, when

there is reason to believe a particular individual may alter or substitute the specimen provided. Reasons to believe a person may alter or substitute the specimen include, but are not limited to:

1. The individual is being tested pursuant to Chapter 4.A.3, relating to reasonable suspicion testing;
2. The individual has previously been found by the EPA to be an illegal drug user;
3. The individual has previously tampered with a sample;
4. Facts and circumstances suggest that the individual—
   a. is an illegal drug user;
   b. is under the influence of drugs at the time of the test; or
   c. has equipment or implements capable of tampering or altering urine samples.

I. *Opportunity to Justify a Positive Test Result*

1. When a confirmed positive result has been returned by the laboratory, the MRO shall perform the duties set forth in the HHS Guidelines. For example, the MRO may choose to conduct employee medical interviews, review employee medical history, or review any other relevant biomedical factors. The MRO must review all medical records made available by the tested employee when a confirmed positive test could have resulted from legally prescribed medication.

   Evidence to justify a positive result may include, but is not limited to:

   (a) A valid prescription.

   (b) An affidavit from the employee's physician verifying a valid prescription.

2. Individuals are not entitled, however, to present evidence to the MRO in a trial-type administrative proceeding, although the MRO has the descretion to accept evidence in any manner the MRO deems most efficient or necessary.

3. If the MRO determines there is no justification for the positive result, such result will then be considered a verified positive test result. The MRO shall immediately contact the EAP Administrator upon obtaining a verified positive test result.

J. *Refusal to Take Drug Test When Required*

1. An employee who refuses to be tested when so required will be subject to the full range of disciplinary action, including dismissal.

2. No applicant who refuses to be tested shall be extended an offer of employment.

3. Attempts to alter or substitute the specimen provided will be deemed a refusal to take the drug test when required.

K. *Finding of Drug Use and Disciplinary Consequences*

1. Drug Use Determination. An employee may be found to use illegal drugs on the basis of any appropriate evidence including, but not limited to:

   (a) Direct observation;

   (b) Evidence obtained from an arrest or criminal conviction;

   (c) A verified positive test result; or

   (d) An employee's voluntary admission.

2. Employees in Sensitive Positions. DOJ shall not allow an employee to remain on duty in a sensitive position after being found to use illegal drugs, prior to successful completion of rehabilitation through

an EAP. However, as part of an EAP, the Component Head may, in his discretion, allow an employee to return to duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or national security.

3. Range of Consequences. DOJ shall initiate action to discipline any employee who is found to use illegal drugs except that DOJ is not required to initiate any disciplinary action against an employee who voluntarily identifies himself as a user of illegal drugs prior to being identified through other means, obtains counseling or rehabilitation, and thereafter refrains from using illegal drugs. Such disciplinary action, consistent with the requirements of Civil Service Reform Act and other statutes and regulations, may include any of the following measures, but some disciplinary action must be initiated:

(a) Reprimanding the employee in writing;

(b) Placing the employee in an enforced leave status, if the employee so requests;

(c) Suspending the employee for fourteen days or less;

(d) Suspending the employee for 15 days or more;

(e) Suspending the employee until such time as he or she successfully completes counseling or rehabilitation or until the Department determines that action other than suspension is more appropriate;

(f) Removing the employee from the service.

DOJ shall refer an employee found to use illegal drugs to an EAP. Such referral, however, does not preclude initiation of disciplinary proceedings.

4. Initiation of Mandatory Removal From Service. The DOJ shall initiate action to remove an employee for:

   a. Refusing to obtain counseling or rehabilitation through an Employee Assistance Program as required by the Executive Order after having been found to use illegal drugs;

   b. Having been found not to have refrained from illegal drug use after a first finding of illegal drug use.

5. Voluntary Referral.

   (a) Under Executive Order 12564, the DOJ is required to initiate action to discipline any employee found to use illegal drugs in every circumstance except one. If an employee (1) voluntarily admits his or her drug use; (2) completes counseling or an EAP; and (3) and thereafter refrains from drug use, such discipline "is not required."

   (b) The decision whether to discipline a voluntary referral will be made by the Component Head on a case-by-case basis depending upon the facts and circumstances. Although an absolute bar to discipline cannot be provided for certain positions because of their extreme sensivity, the DOJ, in determining whether to discipline, shall consider that the employee has come forward voluntarily.

   (c) Moreover, in coming forward, and consistent with Chapter 4.A.2, an employee may volunteer for a drug test as a means of self-identification. Although this self-identification test may yield a verified positive test result, such test result shall merely constitute an identification for purposes of this Section.

L. Employee Counseling and Assistance

1. DOJ shall continue its sponsorship of an EAP program which includes programs for referrals for drug abuse prevention and treatment and for the rehabilitation of employees with drug use problems.

2. While participating in a counseling or rehabilitation program, and at the request of the program, the employee may be exempted from the random testing designated position pool for a period not to exceed sixty days, or for a time period specified in an abeyance contract or rehabilitation plan approved by the Component Head. Upon completion of the program, the employee immediately shall be subject to follow-up testing pursuant to Chapter 4.A.5.

CHAPTER 5.

RECORDS AND REPORTS

A. Confidentiality of Test Results

The laboratory may disclose confirmed laboratory test results only to the MRO or the staff of the MRO. Any positive result which the MRO justifies by licit and appropriate medical or scientific documentation to account for the result as other than the intentional ingestion of an illegal drug will be treated as a negative test result and may not be released for purposes of identifying illegal drug use. Test Results will be protected under the provisions of the Privacy Act, 5 U.S.C. § 552a, et seq. Additionally, for the OBDs and USMS, test results will be protected under Section 503(e) of the Act, and may not be released in violation thereof. The MRO or the staff of the MRO may maintain only those records necessary for compliance with this order. Any records of the MRO, including drug test results, may be released to any supervisor or management official for purposes of auditing the activities of the MRO, except that the disclosure of the results of any audit may not include personal identifying information on any employee.

In order to comply with Section 503(e) of the Act, the results of a drug test of a DOJ employee may not be disclosed without the prior written consent of such employee, unless the disclosure would be—

1. To the MRO;
2. To the EAP Administrator in which the employee is receiving counseling or treatment or is otherwise participating;
3. To any supervisory or management official within the DOJ having authority to take adverse personnel action against such employee; or
4. Pursuant to the order of a court of competent jurisdiction or where required by the United States Government to defend against any challenge against any adverse personnel action.

For purposes of this Section, "management official" includes any management or government official whose duties necessitate review of the test results in order to process adverse personnel action against the employee. In addition, test results with all identifying information removed shall also be made available to DOJ personnel, including the DPC, for data collection and other activities necessary to comply with Section 503(f) of the Act.

B. *Test Results*

Any employees who are the subject of a drug test under this order shall, upon written request, have access to:

1. Any records relating to such employee's drug test; and
2. Any records relating to the results of any relevant certification, review, or revocation-of certification proceedings, as referred to § 503(a)(1)(A)(iii)(III) of the Act.

Except as authorized by law, an applicant who is the subject of a drug test, however, shall not be entitled to this information.

C. Confidentiality of Records in General

All drug testing information specifically relating to individuals is confidential and should be treated as such by anyone authorized to review or compile program records. In order to efficiently implement this order and to make information readily retrievable, the DPC shall maintain all records relating to reasonable suspicion testing, suspicion of tampering evidence, and any other authorized documentation necessary to implement this order.

All records and information of the personnel actions taken on employees with verified positive test results should—where appropriate—be forwarded to the Labor Management Relations Section. Such records shall remain confidential, locked in a combination safe, with only authorized individuals who have a "need-to-know" having access to them.

D. *Employment Assistance Program Records*

The EAP Administrator shall maintain only those records necessary to comply with this order. After [an operating unit head] refers an employee to an EAP, the EAP will maintain all records necessary to carry out its duties. All medical and or rehabilitation records concerning the employee's drug abuse, including EAP records of the identity, diagnosis, prognosis, or treatment are confidential and may be disclosed only as authorized by 42 C.F.R. Part 2, including the provision of written consent by the employee. With written consent, the patient may authorize the disclosure of those records to the patient's employer for verification of treatment or for a general evaluation of treatment progress. (42 C.F.R. § 2.1 et seq. (1986, revised regulations promulgated at 52 F.R. 21796, June 9, 1987).

E. *Maintenance of Records in General*

All drug testing records must be maintained with due regard to applicable federal laws, rules and regulations regarding confidentiality of records including the Privacy Act, 5 U.S.C. § 552a and § 503 of the Act. All drug testing records shall be maintained for at least three years. If necessary, records may be maintained as required by subsequent administrative or judicial proceedings, or at the discretion of the Component Head. The record keeping system should capture sufficient documents to meet the operational and statistical needs of this order, and include:

1. Notices of verified positive test results referred by the MRO;
2. Written materials justifying reasonable suspicion testing or evidence that an individual may have altered or tampered with a specimen;
3. Anonymous statistical reports; and
4. Other documents the DPC, MRO, or EAP Administrator deems necessary for efficient compliance with this order.

F. *Records Maintained By Government Contractors*

Any Component that hires a contractor to satisfy any part of this order shall require as part of the contract that all drug testing records maintained by the contractor comply with the confidentiality requirements of this order, § 503 of the Act, applicable federal laws, rules, regulations and guidelines.

G. Statistical Information

The DPC shall collect and compile anonymous statistical data for reporting the number of—

1. Random tests, reasonable suspicion tests, accident or unsafe practice tests, follow-up tests, or applicant tests administered;

2. Verified positive test results;
3. Voluntary drug counseling referrals;
4. Involuntary drug counseling referrals;
5. Terminations or denial of employment offers resulting from refusal to submit to testing;
6. Terminations or denial of employment offers resulting from alteration of specimens;
7. Terminations or denial of employment offers resultin from failure to complete a drug abuse counseling program; and
8. Employees who successfully complete EAP.

This data, along with other pertinent information, shall be compiled for inclusion in DOJ's annual report to Congress required by Section 503(f) of the Act. This data shall also be provided to HHS semi-annually to assist in overall program evaluation and to determine whether changes to the HHS Guidelines may be required.

Amendments
Approved:

Date: 17 Dec. 87

s Edwin Meese III
EDWIN MEESE III
Attorney General

EXCERPT FROM EXHIBIT A TO DEPARTMENT OF JUSTICE DRUG-FREE WORKPLACE PLAN

Titles	*Location*
Chief Trial Attorney Paralegal Specialist Legal Technician (Typing) Secretary	Communications and Finance Section Antitrust Division

Incumbents in this section review mergers and are responsible for enforcement of the civil and criminal provisions of the antitrust laws and competition advocacy in a variety of assigned industry areas. They also advocate competition in proceedings before a number of regulatory agencies.

Decisions and performance impaired by illegal drug use could result in the mishandling of grand jury, sensitive, or security classified information, compromising the integrity of the government's law enforcement process and jeopardizing national security. Law enforcement decisions made under the influence of illegal drug use could result in a failure to enforce the antitrust laws appropriately and have serious adverse effects on the American economy. A loss of public trust in officials and employees who use drugs would discourage voluntary cooperation with Division investigative efforts and hamper mission accomplishment.

U.S. DEPARTMENT OF JUSTICE

ORDER

OBD 1792.1A
Nov. 1, 1989

Subject:

DRUG-FREE WORKPLACE PROGRAM FOR THE OFFICES, BOARDS AND DIVISIONS

1. *PURPOSE.* This order establishes policy and procedures for the Drug-Free Workplace Program (hereinafter referred to as the OBD Program) for:

   a. Employee assistance.

   b. Supervisory training.

   c. Employee education.

   d. Identification of illegal drug use through drug testing on a carefully controlled and monitored basis.

2. *SCOPE.* This order shall be effective immediately for the following organizations (for the purposes of this order, hereinafter referred to as OBDs):

   Office of the Attorney General
   Office of the Deputy Attorney General
   Office of the Associate Attorney General
   Office of the Solicitor General
   Office of Intelligence Policy and Review
   Office of Justice Programs
   Office of Legal Counsel
   Office of Legislative Affairs
   Office of Liaison Services
   Office of Policy Development
   Office of Professional Responsibility
   Office of Public Affairs
   Office of the Pardon Attorney
   Executive Office for Immigration Review

Executive Office for United States Attorneys
United States Attorneys' Offices
Executive Office for United States Trustees
United States Trustees' Offices
Community Relations Service
Justice Management Division
Antitrust Division
Civil Division
Civil Rights Division
Criminal Division
Tax Division
Land and Natural Resources Division
United States Parole Commission
International Criminal Police Organizations—
United States National Central Bureau

3. *CANCELLATION.* Order OBD 1792.1 is cancelled.

4. *AUTHORITY.* Executive Order 12564, The Supplemental Appropriations Act of 1987, Pub. L. 100-71, Section 503 (hereinafter refererd to as the Act), 21 U.S.C. § 802(b), and the Department of Justice Drug-Free Workplace Plan dated September 25, 1987, as amended on December 17, 1987 (hereinafter referred to as the DOJ Plan).

5. REFERENCES. This order incorporates Departmental policy in the following program areas: discipline and adverse action, and employee assistance and personnel security.

6. *POLICY.* It is the policy of the Department of Justice to achieve a drug-free workplace. The specific objectives, procedures and guidelines of this order are applicable solely within the OBDs listed in paragraph 2 of this order and are set forth to achieve a drug-free workplace.

7. *DEFINITIONS*

a. *Applicant* means any individual not currently employed by the OBDs who is tentatively selected for

employment with the OBDs or is employed in the OBDs and identified for placement in a testing designated position (TDP).

b. *Employee Assistance Program (EAP)* means the OBD-based counseling program that offers assessment, short-term counseling, and referral services to employees and their families for a wide range of drug, alcohol and mental health problems, and monitors their progress while in treatment.

c. *Director, Employee Assistance Program* means the individual responsible for ensuring the development, implementation and review of the agency EAP.

d. *Testing Designated Position* means positions within the OBDs which have been designated for random testing under paragraph 10 of this order.

e. *Probationary Employee Testing* means random testing of employees during their first year of federal service.

8. *RESPONSIBILITIES.*

a. *Assistant Attorney General for Administration (AAG/A).* The AAG/A shall be the component head for purposes of this order and may delegate that authority. The AAG/A shall oversee the OBD Program and make final determinations for the OBDs on challenges to TDP classifications under Chapter 2.D of the DOJ Plan.

b. *Deputy Assistant Attorney General/Information and Administrative Services (DAAG/IAS).* The DAAG/IAS shall supervise the Drug Program Coordinator (DPC) and maintain supervisory oversight over the OBD Program. The DAG/IAS shall assure that necessary resources are provided to the DPC for the administration of the OBD Program.

c. *Deputy Assistant Attorney General/Controller (DAAG C).* The DAAG/C shall provide necessary logistic support to the OBD Program including the generation and maintenance of the random pools and lists to be used in random testing selections.

d. *Drug Program Coordinator (DPC).*

(1) The OBDs shall have a DPC assigned to carry out the OBD Program. The DPC shall be responsible for implementing, directing, administering and managing the drug testing program within the OBDs. In addition, the DPC shall serve as the Contracting Officer's Technical Representative (COTR) and the principal contact with the laboratory in assuring the effective operation of the testing aspect of the OBD Program.

(2) In addition to those duties set forth in Chapter 3.C of the DOJ Plan, the DPC shall:

(a) Implement the OBD Plan under the supervision of the DAAG/IAS.

(b) Coordinate with and report to the DAAG/IAS on information and findings that may affect the reliability or accuracy of laboratory results.

(c) Confirm with the appropriate personnel official to determine whether an OBD applicant has been found to be drug-free.

(d) Assure that applicants with verified positive test results are not hired by the OBDs.

(e) Obtain results of positive drug tests from the MRO and ensure that these

results are transmitted to the appropriate supervisor and that current employees with verified positive test results are taken out of testing designated positions during counseling or rehabilitation.

e. *Director, Employee Assistance Program.* In addition to those duties set forth in Chapter 3.F of the DOJ Plan, the Director, EAP shall:

(1) Coordinate with the DPC, the MRO and supervisors, as appropriate.

(2) Work with the DPC to provide educational materials and training developed under the OBD Program to managers, supervisors and employees.

(3) Ensure that training is provided to assist supervisors in the recognition and documentation of facts and circumstances that support a reasonable suspicion that an employee may be using illegal drugs.

f. *Supervisors.* Supervisors shall carry out those duties set forth in Chapter 3.G of the DOJ Plan.

g. *Government Contractors.* Wherever existing facilities are inadequate to implement this order, the DAAG/IAS shall:

(1) Delegate authority for the administration of all related contracts and ensure that contractors chosen to perform duties under this order meet the Health and Human Services (HHS) Scientific and Technical Guidelines and laboratory certification standards.

(2) Establish, by contract or other procurement mechanism, the position and specific responsibilities of the MRO as required by the HHS guidelines.

h. *Medical Review Officer (MRO).* The MRO is responsible for receiving laboratory results generated from the DOJ Drug-Free Workplace Program. The MRO is a licensed physician with knowledge of substance abuse disorders and has the appropriate medical training to interpret and evaluate all positive test results together with an individual's medical history and any other relevant biomedical information.

9. *TESTING ANNOUNCEMENT AND NOTIFICATION PROCEDURES.*

a. *General Announcement.* A general announcement from the AAG/A announcing the testing program was issued on June 27, 1988, to specified OBDs. Notification to the Office of Justice Programs, U.S. Attorneys Offices and other OBD field offices will be made in conformance with Chapter 2.A of the DOJ Plan.

b. *Individual Notification.* In addition to the general announcement, an individual notification and acknowledgement shall be distributed to all employees in testing designated positions and shall conform to Chapter 2.B and 2.C of the DOJ Plan.

c. *Administrative Relief.* As provided in Chapter 2.D of the DOJ Plan, the AAG/A is the designated official.

10. *OBD TESTING DESIGNATED POSITIONS.* Employees in the following position categories have been selected as testing designated positiions in the OBDs.

a. All incumbents currently authorized to have access to top secret classified information in accordance with Executive Order 12356.

b. All incumbents serving under Presidential appointments.

c. All incumbents whose assigned position duties include maintaining, storing or safeguarding a controlled substance as defined by Section 802(6) of Title 21 of the United States Code.

11. *NATURE, FREQUENCY, AND TYPE OF DRUG TESTING TO BE INSTITUTED.*

a. Section 503 of the Act requires the OBD Program to specify the nature, frequency, and type of drug testing to be instituted. The OBD Program includes the following types of drug testing:

(1) Applicant testing.

(2) Random testing of sensitive positions in testing designated positions.

(3) Probationary employee testing.

(4) Reasonable suspicion testing.

(5) Accident or unsafe practice testing.

(6) Voluntary testing.

(7) Testing as part of or as a follow-up to counseling or rehabilitation.

b. Incumbents in TDPs will be tested at an annual frequency of 7%. Those employees with less than one year of federal service and who occupy TDPs will be tested at an annual frequency of 100%. The Assistant Attorney General for Administration reserves the right to increase or decrease the frequency of testing based on the OBD mission, needs, availability of resources, and experience in the OBD Program, consistent with the duty to achieve a drug-free workplace under the Executive Order.

c. Section 503 of the Act requires the OBDs to specify the drugs for which individuals shall be tested. These are: marijuana, cocaine, opiates, amphetamines and phencyclidine (PCP).

12. *RANDOM TESTING.*

a. *Positions Designated for Random Drug Testing.* The titles of positions designated for random drug testing and the procedures applied in such designations have been established and disseminated to Executive Officers in the OBDs.

b. *Random Testing Procedures.* Random testing procedures shall be in accordance with Chapter 4.C, D, E, G, H, I and J of the DOJ Plan.

13. *REASONABLE SUSPICION TESTING.*

a. *Procedures.*

(1) If an employee is suspected of using drugs, consistent with Chapter 4.A.3 of the DOJ Plan, the appropriate supervisor shall gather all information, facts and circumstances leading to and supporting this suspicion. A higher-level supervisor shall concur in a reasonable suspicion determination prior to coordinating with the DPC for scheduling a test.

(2) Once reasonable suspicion has been established, the DPC shall ensure that the record contains the circumstances which formed the basis of the determination that reasonable suspicion exists to warrant the testing. The report shall include, at a minimum, the dates times of reported incidents, sources of information and appropriate factual observations.

b. *Obtaining the Sample.* In accordance with Chapter 4.H.1 of the DOJ Plan, if there is reason to

believe an individual being tested under reasonable suspicion may alter or substitute the specimen provided, then privacy need not be afforded.

14. *APPLICANT TESTING.*

a. *Objectives.* To maintain the high professional standards of the OBD workforce, it is imperative that individuals who use illegal drugs be screened out during the initial employment process before they are placed on the employment rolls of the OBD.

b. *Extent of Testing.* Drug testing shall be required of all OBD applicants as defined in paragraph 7a of this order.

c. *Procedures.*

(1) The hiring administrative office of each OBD shall schedule applicants for drug testing in coordination with the DPC. The collection shall be undertaken within 48 hours of notification to the applicant. Where appropriate, applicants may be reimbursed for reasonable travel expenses.

(2) Applicants shall be provided the opportunity to submit medical documentation that may support a legitimate use for a specific drug to the MRO or the staff of the MRO to determine whether the individual is licitly using an otherwise illicit drug.

d. *Personnel Officials.* Upon notification that an individual has been tentatively selected for employment with the OBDs, the hiring administrative office shall assure, after consultation with the DPC, that a drug test has been conducted and that the result was negative.

e. *Consequences.* The OBDs shall decline to extend a final offer of employment to any applicant with

a verified positive test result, and such applicant will not be considered for employment with the OBDs for a period of six months. The hiring administrative office shall inform the applicant that a confirmed presence of drugs in the applicant's urine precludes the OBD from hiring the applicant.

15. *ADDITIONAL TYPES OF DRUG TESTING.*

a. *Accident or Unsafe Practice Testing.* The OBDs are committed to providing a safe and secure work environment. Employees involved in on-the-job accidents or who engage in unsafe on-duty job-related activities that pose a danger to others or the overall operation of the OBDs, may be subject to testing. Based on the circumstances of the accident or unsafe act, the DPC may initiate testing when there is:

(1) Evidence of unsafe practice.

(2) Significant damage to property.

(3) Careless operation of a vehicle.

(4) Significant injury to persons.

(5) A pattern of erratic incidents.

b. *Voluntary Testing.* Voluntary testing shall be conducted as provided under Chapter 4.A.2 and 4.K.5 of the DOJ Plan.

c. *Follow-up Testing.* All employees required to undergo a counseling or rehabilitation program for illegal drug use through the EAP, as a result of the drug testing program, will be placed in a follow-up pool where they will be subject to regular, unannounced testing for a period of one year. Such employees shall be tested as often as stipulated in the abeyance agreement, or, in the alternative, at an increased frequency of ten

times per year. Employees who complete a drug treatment program through an EAP who are returned to TDPs will, in addition to follow-up testing, be returned to the random testing pool.

d. *Probationary Employee Testing.* Employees with less than one year of federal service, who occupy TDPs will be tested at a frequency of 100%. Employees will be scheduled for testing on a random basis during the first year. Selection from this pool does not remove the employee from the random pool.

16. *TEST PROCEDURES.*

a. *General.* The OBDs shall comply with applicable test procedures specified in the DOJ Plan.

b. *Suspect Samples.* Collection site personnel shall retain any sample that shows evidence of tampering or substitution under the HHS Scientific and Technical Guidelines. After consultation with the DPC and in accordance with Chapter 4.A.3 of the DOJ Plan, a second sample may be required under direct observation.

17. *FINDING OF DRUG ABUSE AND DISCIPLINARY CONSEQUENCES.*

a. *Mandatory Administrative Actions.*

(1) Upon a finding of illegal drug use, action shall be taken as specified in Chapter 4.K of the DOJ Plan.

(2) As provided in Chapter 4.K.2 of the DOJ Plan, the AAG A shall determine whether the employee may return to duty in a sensitive position.

b. *Range of Consequences.* The severity of the disciplinary action taken against an employee found to use illegal drugs will depend on the circum-

stances of each case, and will be consistent with the Executive Order and includes the full range of disciplinary actions, including removal. The OBDs shall initiate disciplinary action against any employee found to use illegal drugs but shall not discipline an employee who voluntarily admits to illegal drug use in accordance with the Voluntary Referral Provision in paragraph 17c of this order.

c. *Voluntary Referral.*

(1) Chapter 4.K.3 of the DOJ Plan permits the OBDs to create a SAFE HARBOUR for an employee who voluntarily identifies himself/herself as a user of illegal drugs pursuant to Chapter 4.K.1 (a), (b), and (c) of the DOJ Plan and who therefore requests protection under this program who:

(a) Voluntarily identifies himself herself as a user of illegal drugs prior to being identified through other means;

(b) Obtains counseling or rehabilitation through an Employee Assistance Program; and

(c) Thereafter refrains from using illegal drugs.

(2) This self-referral option allows any employee to step forward and identify himself herself as a user of illegal drugs for the purpose of obtaining counseling or rehabilitation.

(3) In stepping forward, and consistent with the voluntary testing provision in Chapter 4.A.2 of the DOJ Plan, an employee may also volunteer for a drug test as a means of self-identification. Although this self-identifica-

tion test may yield a verified positive test result, such test results shall merely constitute an identification for purposes of this Section.

(4) This provision shall not be available to an employee who has been provided notice to give a urine sample under this order or who is found to have used illegal drugs pursuant to Chapter 4.K.1(a), (b), or (c) of the DOJ Plan and who thereafter requests protection under this provision.

18. *EMPLOYEE ASSISTANCE PROGRAMS*

a. *Function.* The OBD EAP plays an important role in preventing and resolving employee drug use by: demonstrating the OBD commitment to eliminating illegal drug use; providing employees an opportunity, with appropriate assistance, to discontinue their drug use; providing educational materials to supervisors and employees on drug use issues; assisting supervisors in confronting employees who have performance and/or conduct problems and making referrals to appropriate treatment and rehabilitative facilities; and following individuals during the rehabilitative period to track their progress and encourage successful completion of the program. The EAP, however, shall not be involved in the collection of urine samples or the initial reporting of test results. The purpose of the EAP is to:

(1) Provide counseling and assistance to employees who self-refer to treatment or whose drug tests have been confirmed positive, and monitor the employee progress through treatment and rehabilitation.

(2) Provide needed education and training to all levels of the OBDs on types and effects of drugs, symptoms of drug use and its impact

on performance and conduct, the relationship of the EAP to the drug testing program, and, finally, treatment, rehabilitation, and records confidentiality requirements.

(3) Ensure that confidentiality of test results and related medical treatment and rehabilitation records are maintained in accordance with the confidentiality requirements of Chapter 5 of the DOJ Plan.

b. *Referral and Availability.* Any employee found to use illegal drugs shall be referred to the EAP. This program shall be administered separately from the drug testing program in accordance with employee assistance program policy, and shall be available to all employees without regard to a finding of drug use. The EAP shall provide counseling or rehabilitation for all referrals, as well as education and training regarding illegal drug use. The EAP may require drug testing of program participants. The EAP is available not only to OBD employees, but, when feasible, to the families of employees with drug problems, and to employees with family members who have drug problems.

c. *Leave Allowances.* Employees may be allowed up to one hour (or more as necessitated by travel time) of excused absence for each counseling session, during the assessment referral phase of rehabilitation. Absences during duty hours for rehabilitation or treatment will be charged in accordance with applicable leave regulations.

d. *Records and Confidentiality.* All EAP counseling, rehabilitation or drug testing records shall be maintained in compliance with the confidentialty requirements of this order, the DOJ Plan, § 503 of the Act, applicable federal laws, rules, regulations and guidelines.

c. *Structure.* The AAG A shall be responsible for oversight and implementation of the OBD EAP, and shall provide, with the support of the Attorney General, high level direction to and promotion of the EAP.

19. *SUPERVISORY TRAINING.*

a. *Objectives.* As supervisors have a key role in establishing and monitoring a drug-free workplace, training shall be provided to assist supervisors and managers in recognizing and addressing, with the assistance and expertise of the EAP, illegal drug use by OBD employees. The purpose of supervisory training is to understand:

(1) Departmental policies relevant to work performance problems, drug use, and the OBD EAP.

(2) The responsibilities of offering EAP services.

(3) How employee performance and behavioral changes should be recognized and documented.

(4) The respective roles of the MRO, supervisors, personnel officials, and EAP staff.

(5) The ways to use the OBD EAP.

(6) How the EAP is linked to the performance appraisal and the disciplinary processes.

(7) The process of reintegrating employees into the workforce.

b. *Implementation.* The Justice Management Division shall be responsible for implementing supervisory training, and shall develop a training package to ensure that all employees and supervisors are informed of the OBD Drug-Free Workplace Plan.

c. *Training Package.* Supervisory training shall be required for all supervisors and may be presented as a separate course, or be included as part of an ongoing supervisory training program. Training shall be provided as soon as possible after a person assumes supervisory responsibility. Training courses should include:

(1) Overall Departmental policy.

(2) The prevalence of various employee problems with respect to drugs and alcohol.

(3) The EAP approach to handling problems.

(4) How to recognize employees with possible problems.

(5) Documentation of employee performance or behavior.

(6) How to approach the employee.

(7) How to use the EAP.

(8) Disciplinary action, and removals from sensitive positions as required by Section 5(c) of the Executive Order.

(9) Reintegration of employees into the workforce.

(10) Written materials which the supervisor can use at the work site.

20. *EMPLOYEE EDUCATION.*

a. *Objective.* The EAPA shall offer drug education to all OBD employees. Drug education shall include:

(1) Types and effects of drugs.

(2) Symptoms of drug use, and the effects on performance and conduct.

(3) The relationship of the EAP to the drug testing program.

(4) Other relevant treatment, rehabilitation, and confidentiality issues.

b. *Means of Education.* Drug education activities may include:

(1) Distribution of written materials.

(2) Videotapes and films.

(3) Lunchtime employee forums.

(4) Employee drug awareness days.

21. *RECORDS AND REPORTS CONFIDENTIALITY.* All records and reports under this order shall be maintained in conformity with the confidentiality requirements of Chapter 5 of the DOJ Plan, § 503 of the Act, applicable laws, rules, regulations and guidelines.

/s/ Harry H. Flickinger
HARRY H. FLICKINGER
Assistant Attorney General
for Administration

Federal Register, Vol. 53, No. 69
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MANDATORY GUIDELINES FOR FEDERAL WORKPLACE DRUG TESTING PROGRAMS

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Authority: E.O. 12564 and sec. 503 of Pub. L. 100-71.

Subpart A.—General

1.1 Applicability.

(a) These mandatory guidelines apply to:

(1) Executive Agencies as defined in 5 U.S.C. 105;

(2) The Uniformed Services, as defined in 5 U.S.C. 2101 (3) (but excluding the Armed Forces as defined in 5 U.S.C. 2101(2));

(3) And any other employing unit or authority of the Federal Government except the United States Postal Service, the Postal Rate Commission, and employing units or authorities in the Judicial and Legislative Branches.

(b) Any agency or component of an agency with a drug testing program in existence as of September 15, 1966, and the Departments of Transportation and Energy shall take such action as may be necessary to ensure that the agency is brought into compliance with these Guidelines no later than 90 days after they take effect, except that any judicial challenge that affects these Guidelines shall not affect drug testing programs subject to this paragraph.

(c) Except as provided in 2.6, Subpart C of these Guidelines (which establishes laboratory certification standards) applies to any laboratory which has or seeks certification to perform urine drug testing for Federal

agencies under a drug testing program conducted under E.O. 12564. Only laboratories certified under these standards are authorized to perform urine drug testing for Federal agencies.

(d) The Intelligence Community, as defined by Executive Order No. 12333, shall be subject to these Guidelines only to the extent agreed to by the head of the affected agency.

(e) These Guidelines do not apply to drug testing conducted under legal authority other than E.O. 12564, including testing of persons in the criminal justice system, such as arrestees, detainees, probationers, incarcerated persons, or parolees.

(f) Agencies may not deviate from the provisions of these Guidelines without the written approval of the Secretary. In requesting approval for a deviation, an agency must petition the Secretary in writing and describe the specific provision or provisions for which a deviation is sought and the rationale therefor. The Secretary may approve the request upon a finding of good cause as determined by the Secretary.

1.2 Definitions.

For purposes of these Guidelines the following definitions are adopted:

Aliquot A portion of a specimen used for testing.

Chain of Custody Procedures to account for the integrity of each urine specimen by tracking its handling and storage from point of specimen collection to final disposition of the specimen. These procedures shall require that an approved agency chain of custody form be used from time of collection to receipt by the laboratory and that upon receipt of the laboratory an appropriate laboratory chain of custody form(s) account for the sample or sample aliquots within the laboratory chain of custody forms shall, at a minimum, include an entry docu-

menting date and purpose each time a specimen or aliquot is handled or transferred and identifying every individual in the chain of custody.

Collection Site A place designated by the agency where individuals present themselves for the purpose of providing a specimen of their urine to be analyzed for the presence of drugs.

Collection Site Person A person who instructs and assists individuals at a collection site and who receives and makes an initial examination of the urine specimen provided by those individuals. A collection site person shall have successfully completed training to carry out this function.

Confirmatory Test A second analytical procedure to identify the presence of a specific drug or metabolite which is independent of the initial test and which uses a different technique and chemical principle from that of the initial test in order to ensure reliability and accuracy. (At this time gas chromatography/mass spectrometry (GC MS) is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.)

Initial Test (also known as Screening Test) An immurossay screen to eliminate "negative" urine specimens from further consideration.

Medical Review Officer A licensed physician responsible for receiving laboratory results generated by an agency's drug testing programs who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's positive test result together with his or her medical history and any other relevant biomedical information.

Permanent Record Book A permanently bound book in which identifying data on each specimen collected at a collection site are permanently recorded in the sequence of collection.

Reasons to Believe Reasons to believe that a particular individual may alter or substitute the urine specimen as provided in section 4(c) of E.O. 12564.

Secretary The Secretary of Health and Human Services or the Secretary's designee. The Secretary's designee may be contractor or other recognized organization which acts on behalf of the Secretary in implementing these Guidelines.

1.3 Future Revisions.

In order to ensure the full reliability and accuracy of drug assays, the accurate reporting of test results, and the integrity and efficacy of Federal drug testing programs, the Secretary may make changes to these Guidelines to reflect improvements in the available science and technology. These changes will be published in final as a notice in the Federal Register.

Subpart B—Scientific and Technical Requirements

2.1 The Drugs.

(a) The President's Executive Order 12564 defines "illegal drugs" as those included in Schedule I or II of the Controlled Substances Act (CSA), but not when used pursuant to a valid prescription or when used as otherwise authorized by law. Hundreds of drugs are covered under Schedule I and II and while it is not feasible to test routinely for all of them. Federal drug testing programs shall test for drugs as follows:

(1) Federal agency applicant and random drug testing programs shall at a minimum test for marijuana and cocaine;

(2) Federal agency applicant and random drug testing programs are also authorized to test for opiates, amphetamines, and phencyclidine; and

(3) When conducting reasonable suspicion, accident, or unsafe practice testing, a Federal agency may test for any drug listed in Schedule I or II of the CSA.

(b) Any agency covered by these guidelines shall petition the Secretary in writing for approval to include in its testing procedures any drugs (or classes of drugs) not listed for Federal agency testing in paragraph (a) of this section. Such approval shall be limited to the use of the appropriate science and technology and shall not otherwise limit agency discretion to test for any drugs covered under Schedule I or II of the CSA.

(c) Urine specimens collected pursuant to Executive Order 12564, Pub. L. 100-71, and those Guidelines shall be used only to test for those drugs included in agency drug-free workplace plans and may not be used to conduct any other analysis or test unless otherwise authorized by law.

(d) These Guidelines are not intended to limit any agency which is specifically authorized by law to include additional categories of drugs in the drug testing of its own employees or employees in its regulated industries.

2.2 Specimen Collection Procedures.

(a) Designation of Collection Site. Each agency drug testing program shall have one or more designated collection sites which have all necessary personnel, materials, equipment, facilities, and supervision to provide for the collection, security, temporary storage, and shipping or transportation of urine specimens to a certified drug testing laboratory.

(b) Security. Procedures shall provide for the designated collection site to be secure. If a collection site facility cannot be dedicated solely to drug testing, the portion of the facility used for testing shall be secured during drug testing.

(c) Chain of Custody. Chain of custody standardized forms shall be properly executed by authorized collection site personnel upon receipt of specimens. Handling and transportation of urine specimens from one authorized individual or place to another shall always be accomplished through chain of custody procedures. Every effort shall be made to minimize the number of persons handling specimens.

(d) Access to Authorized Personnel Only. No unauthorized personnel shall be permitted in any part of the designated collection site when urine specimens are collected or stored.

(e) Privacy. Procedures for collecting urine specimens shall allow individual privacy unless there is reason to believe that a particular individual may alter or substitute the specimen to be provided.

(f) Integrity and Identity of Specimen. Agencies shall take precautions to ensure that a urine specimen not be adulterated or diluted during the collection procedure and that information on the urine bottle and in the record book can identify the individual from whom the specimen was collected. The following minimum precautions shall be taken to ensure that unadulterated specimens are obtained and correctly identified:

(1) To deter the dilution of specimens at the collection site, toilet bluing agents shall be placed in toilet tanks wherever possible, so the reservoir of water in the toilet bowl always remains blue. There shall be no other source of water (e.g., no shower or sink) in the enclosure where urination occurs.

(2) When an individual arrives at the collection site, the collection site person shall request the individual to present photo identification. If the individual does not have proper photo identification, the collection site person shall contact the supervisor of the individual, the coordinator of the drug testing program, or any other agency

official who can positively identify the individual. If the individual's identity cannot be established, the collection site person shall not proceed with the collection.

(3) If the individual fails to arrive at the assigned time, the collection site person shall contact the appropriate authority to obtain guidance on the action to be taken.

(4) The collection site person shall ask the individual to remove any unnecessary outer garments such as a coat or jacket that might conceal items or substances that could be used to tamper with or adulterate the individual's urine specimen. The collection site person shall ensure that all personal belongings such as a purse or briefcase remains with the outer garments. The individual may retain his or her wallet.

(5) The individual shall be instructed to wash and dry his or her hands prior to urination.

(6) After washing hands, the individual shall remain in the presence of the collection site person and shall not have access to any water fountain, faucet, soap dispenser, cleaning agent or any other materials which could be used to adulterate the specimen.

(7) The individual may provide his/her specimen in the privacy of a stall or otherwise partitioned area that allows for individual privacy.

(8) The collection site person shall note any unusual behavior or appearance in the permanent record book.

(9) In the exceptional event that an agency-designated collection site is not accessible and there is an immediate requirement for specimen collection (e.g., an accident investigation), a public rest room may be used according to the following procedures: A collection site person of the same gender as the individual shall accompany the individual into the public rest room which shall be made secure during the collection procedure. If possible, a

toilet bluing agent shall be placed in the bowl and any accessible toilet tank. The collection site person shall remain in the rest room, but outside the stall, until the specimen is collected. If no bluing agent is available to deter specimen dilution, the collection site person shall instruct the individual not to flush the toilet until the specimen is delivered to the collection site person. After the collection site person has possession of the specimen, the individual will be instructed to flush the toilet and to participate with the collection site person in completing the chain of custody procedures.

(10) Upon receiving the specimen from the individual, the collection site person shall determine that it contains at least 60 milliliters of urine. If there is less than 60 milliliters of urine in the container, additional urine shall be collected in a separate container to reach a total of 60 milliters. (The temperature of the partial specimen in each separate container shall be measured in accordance with paragraph (f)(12) of this section, and the partial specimens shall be combined in one container.) The individual may be given a reasonable amount of liquid to drink for this purpose (e.g., a glass of water). If the individual fails for any reason to provide 60 milliliters of urine, the collective site person shall contact the appropriate authority to obtain guidance on the action to be taken.

(11) After the specimen has been provided and submitted to the collection site person, the individual shall be allowed to wash his or her hands.

(12) Immediately after the specimen is collected, the collection site person shall measure the temperature of the specimen. The temperature measuring device used must accurately reflect the temperature of the specimen and not contaminate the specimen. The time from urination to temperature measurement is critical and in no case shall exceed 4 minutes.

(13) If the temperature of a specimen is outside the range of 32.5 -37.7 C 90.5 -99.8 F, that is a reason to believe that the individual may have altered or substituted the specimen, and another specimen shall be collected under direct observation of a same gender collection site person and both specimens shall be forwarded to the laboratory for testing. An individual may volunteer to have his or her oral temperature taken to provide evidence to counter the reason to believe the individual may have altered or substituted the specimen caused by the specimen's temperature falling outside the prescribed range.

(14) Immediately after the specimen is collected, the collection site person shall also inspect the specimen to determine its color and look for any signs of contaminants. Any unusual findings shall be noted in the permanent record book.

(15) All specimens suspected of being adulterated shall be forwarded to the laboratory for testing.

(16) Whenever there is reason to believe that a particular individual may alter or substitute the specimen to be provided, a second specimen shall be obtained as soon as possible under the direct observation of a same gender collection site person.

(17) Both the individual being tested and the collection site person shall keep the specimen in view at all times prior to its being sealed and labeled. If the specimen is transferred to a second bottle, the collection site person shall request the individual to observe the transfer of the specimen and the placement of the tamperproof seal over the bottle cap and down the sides of the bottle.

(18) The collection site person and the individual shall be present at the same time during procedures outlined in paragraphs (f)(19)-(f)(22) of this section.

(19) The collection site person shall place securely on the bottle an identification label which contains the date,

the individual's specimen number, and any other identifying information provided or required by the agency.

(20) The individual shall initial the identification label on the specimen bottle for the purpose of certifying that it is the specimen collected from him or her.

(21) The collection site person shall enter the permanent record book all information identifying the specimen. The collection site person shall sign the permanent record book next to the identifying information.

(22) The individual shall be asked to read and sign a statement in the permanent record book certifying that the specimen identified as having been collected from him or her is in fact that specimen he or she provided.

(23) A higher level supervisor shall review and concur in advance with any decision by a collection site person to obtain a specimen under the direct observation of a same gender collection site person based on a reason to believe that the individual may alter or substitute the specimen to be provided.

(24) The collection site person shall complete the chain of custody form.

(25) The urine specimen and chain of custody form are now ready for shipment. If the specimen is not immediately prepared for shipment, it shall be appropriately safeguarded during temporary storage.

(26) While any part of the above chain of custody procedures is being performed, it is essential that the urine specimen and custody documents be under the control of the involved collection site person. If the involved collection site person leaves his or her work station momentarily, the specimen and custody form shall be taken with him or her or shall be secured. After the collection site person returns to the work station, the custody process will continue. If the collection site person is leaving for an extended period of time, the specimen shall be packaged for mailing before he or she leaves the site.

(g) *Collection Control.* To the maximum extent possible, collection site personnel shall keep the individual's specimen bottle within sight both before and after the individual has urinated. After the specimen is collected, it shall be properly sealed and labeled. An approved chain of custody form shall be used for maintaining control and accountability of each specimen from the point of collection to final disposition of the specimen. The date and purpose shall be documented on an approved chain of custody form each time a specimen is handled or transferred and every individual in the chain shall be identified. Every effort shall be made to minimize the number of persons handling specimens.

(h) Transportation to Laboratory. Collection site personnel shall arrange to ship the collected specimens to the drug testing laboratory. The specimens shall be placed in containers designed to minimize the possibility of damage during shipment, for example, specimen boxes or padded mailers; and those containers shall be securely sealed to eliminate the possibility of undetected tampering. On the tape sealing the container, the collection site supervisor shall sign and enter the date specimens were sealed in the containers for shipment. The collection site personnel shall ensure that the chain of custody documentation is attached to each container sealed for shipment to the drug testing laboratory.

(2)

Supreme Court, U.S.
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No. 91-148

In the Supreme Court of the United States

OCTOBER TERM, 1991

CARL WILLNER, PETITIONER

v.

WILLIAM P. BARR,
ACTING ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Department of Justice, consistently with the Fourth Amendment, may require a drug test of applicants tentatively selected for an attorney position.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-448

CARL WILLNER, PETITIONER

v.

WILLIAM P. BARR,
ACTING ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-30a, is reported at 928 F.2d 1185. The orders of the court of appeals denying petitioner's petition for rehearing and suggestion for rehearing en banc, Pet. App. 31a-33a, are unreported. The opinion of the district court, Pet. App. 36a-47a, is reported at 738 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1991. A petition for rehearing was denied on July 5, 1991. Pet. App. 31a-33a. The petition for a writ of certiorari was filed on September

12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September 1986, the President issued an Executive Order directing federal agencies to adopt programs for ensuring a drug-free federal workplace. Exec. Order No. 12,564, 3 C.F.R. 224 (1987); Pet. App. 49a. Each program was to include provision for drug testing employees. Exec. Order No. 12,564, § 2(b)(5). The Order distinguished between the testing of incumbent federal employees and applicants. In the case of incumbents, testing was limited to "sensitive positions," unless there was reasonable suspicion of illegal drug use, or the testing pertained to an accident or unsafe practice or followed drug counseling or rehabilitation. Exec. Order No. 12,564, § 3(a) and (c); Pet. App. 51a-52a. For applicants there was no such restriction; the Executive Order authorized agencies to test "any" applicant. *Id.* § 3(d); Pet. App. 52a.

In the Executive Order, the President made several findings as to the adverse effects of drug use on the government workplace. Some of these findings pertain principally to employees in sensitive positions: for example, that the use of drugs "can pose a serious health and safety threat to members of the public and to other Federal employees," and that drug use by Federal employees "in certain positions" creates the possibility of undue influence posing a "serious risk to national security, the public safety, and the effective enforcement of the law." Pet. App. 50a. Other findings in the Executive Order pertain to the effects of drug use on all federal employees, regardless of whether they occupy sensitive positions: *i.e.*, that drug-using employees "tend to be less produc-

tive, less reliable, and prone to greater absenteeism"; and that drug use by federal employees "undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively." Pet. App. 49a, 50a.

In adopting a drug testing plan pursuant to the Executive Order for the Department of Justice (DOJ), the Attorney General stated that, due to DOJ's law enforcement responsibilities and the sensitive nature of its work, DOJ has "an especially compelling obligation to eliminate illegal drug use from its workplace. Employees who work for an agency whose mission is to uphold and enforce the law, should not themselves violate the law." Pet. App. 60a. In this regard, the DOJ plan cites the "high public trust" placed in Department attorneys, "requiring them, as a condition of employment and as a measure of their position sensitivity, to pass full-field FBI background investigations before permanent offers of employment are extended." Pet. App. 61a. The plan also cites "the need to maintain employee productivity." *Id.* at 60a.

The DOJ plan, like the Executive Order, distinguishes between the testing of incumbent employees and applicants. The DOJ plan requires testing for all applicants who are tentatively selected for employment. Pet. App. 77a, 93a-94a, 100a. By contrast, the testing of incumbents is limited to "sensitive" positions, unless there is reasonable suspicion or the testing is incident to an accident or unsafe practice, or follows drug counseling or rehabilitation. *Id.* at 98a, 101a-102a. Like the testing of incumbent employees, the testing of applicants is subject to the procedures spelled out in guidelines issued by the Department of Health and Human Services. Pet. App. 81a. These procedures include: (1) a requirement

that the individual be allowed privacy unless there is reason to believe that the individual may alter or substitute the specimen, (2) a requirement that each sample be tested twice according to different testing techniques before being pronounced positive; (3) a requirement to use testing laboratories that are certified by HHS and are continuously monitored through a blind sample testing program that triggers special procedures if any false positives are reported; and (4) review of all test results by a medical review officer, who evaluates whether the result has a legitimate explanation (such as prescription medication). HHS Guidelines, 53 Fed. Reg. 11,970, 11,979 (1988), §§ 2.2(e), 2.4(e), 2.5, 2.7, and Subpart C. The procedures followed by DOJ are the same ones that this Court approved in *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 661-662, 672 n.2 (1989), with one exception that is more favorable to applicants than the *Von Raab* procedure.[1]

2. Petitioner is a lawyer who was accepted for a position in the Antitrust Division of the Justice Department subject to the requirement of passing a drug test. He sought a waiver of the test, but was informed that waivers were not available. He then brought this action, seeking a declaratory judgment and injunction. Pet. App. 37a.

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[1] The one exception pertains to privacy protection in collection of the sample. In the procedure approved in *Von Raab*, the person monitoring sample collection "remains close at hand to listen for the normal sounds of urination," as a precaution against substitution of the sample. *Von Raab*, 489 U.S. at 661. The DOJ procedure is different: "After the individual is escorted to the enclosure, the collection monitor returns to the waiting room to receive the specimen from the individual." Pet. App. 7a-8a.

The district court held that requiring petitioner to submit to a drug test violates the Fourth Amendment. The court reasoned that under *Harmon* v. *Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), cert. denied, 493 U.S. 1056 (1990), the government may conduct suspicionless drug testing of incumbent employees only if their position requires a security clearance, directly involves public safety, or directly involves aspects of drug enforcement. Pet. App. 38a. The court saw no difference between incumbent employees and applicants in this regard. *Id.* at 41a.

3. The court of appeals, by a divided vote, reversed. Pet. App. 1a-18a. Applying the balancing test set forth in *Von Raab* and *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), the court held that the DOJ drug testing program is "reasonable" under the Fourth Amendment.

On the applicant's side of the balance, the court found that the DOJ applicant drug testing program involves "a comparatively slight" and lesser intrusion on privacy than other such programs since (unless there is reason to suspect tampering) the applicant is not visually observed or auditorily monitored while providing a urine sample. Pet. App. 7a-8a. In addition, the only medical fact revealed by the DOJ drug testing program is whether the applicant has recently used illegal drugs, and the applicant must reveal just that fact to the government as part of the FBI background investigation that all applicants must undergo. *Id.* at 8a. Moreover, an applicant is aware of the testing requirement, and he receives 48 hours' advance notice of the actual testing date, which "reduces 'to a minimum' the unsettling effect of unexpected intrusions." *Id.* at 9a (quoting *Von Raab*, 489 U.S. at 672 n.2). Any applicant who finds

testing distasteful may withdraw his application, which is a lesser burden than faced by incumbent employees, who must resign if they object to drug testing. Pet. App. 9a-10a. And finally, the court observed that the practice of testing applicants for drug use is widely followed in the private sector, and determined that the employment practices followed by private employers are relevant to the issue of "what expectation of privacy 'society is prepared to accept as "reasonable" ' when the government engages in the hiring process." *Id.* at 14a (quoting *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

On the governmental interest side of the balance, the court pointed out that drug use among DOJ employees would undermine the Department's "credibility as the nation's leading law enforcement agency," Pet. App. 14a; that the hiring process "is designed to gather information so that a judgment may be made regarding the individual's suitability for employment," *ibid.*; and that recent studies confirmed "an extremely high correlation between a positive result in a pre-employment drug test and subsequent employment problems," *id.* at 15a-16a. The court noted that suspicionless drug testing may not be justified as a means of detecting drug-related employment problems for incumbent employees, because they can be directly observed and tested on a reasonable-suspicion basis. *Id.* at 16a. But an applicant is "an outsider" whom the government "has had no opportunity to observe in the setting of the workplace." *Ibid.*

Judge Henderson dissented. Pet. App. 18a-30a. She concluded that suspicionless drug testing of incumbent employees is permissible only when the job

involves special safety or security considerations, and that this rule should be applied to applicants. *Id.* at 19a-22a. She found that the Department's interest in maintaining the integrity of its lawyers is insufficient to justify applicant drug testing, because that justification was insufficient in the case of incumbents. *Id.* at 22a-23a. She also concluded that applicant drug testing had little utility, since the FBI background investigation supplies the Department with significant information from which it can evaluate an applicant's likely drug use. *Id.* at 24a-26a. Finally, she deemed irrelevant to an applicant's privacy interests advance notice of testing and the practices followed in private industry. *Id.* at 26a-28a.

4. Rehearing en banc was denied, six judges dissenting. Pet. App. 32a-33a.

ARGUMENT

Petitioner argues that the DOJ drug testing plan for attorney-applicants violates the Fourth Amendment. That contention does not warrant review by this Court, for several reasons.

1. There is no conflict among the circuits on the question presented by petitioner. Since *Von Raab* and *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), the courts of appeals have considered the constitutionality of drug testing of incumbent employees in various contexts.[2] Those courts have ruled that suspicionless drug testing of incumbent employees is "reasonable" only if the job at issue involves special considerations relating to security,[3]

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[2] In fact, *Von Raab* itself involved incumbent employees who were tested as a condition of promotion or transfer.

[3] *Hartness* v. *Bush*, 919 F.2d 170 (D.C. Cir. 1990) (secret-level security clearances), cert. denied, 111 S. Ct. 2890

safety [4] or integrity.[5] This case, by contrast, is the first circuit court decision applying the *Von Raab* balancing test to an applicant where the job at issue does not involve one of those factors, and there are material differences between the circumstances of an applicant and an incumbent, as the court below explained.[6] In the absence of a conflict among the cir-

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(1991); *Harmon* v. *Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (top secret-level clearances), cert. denied, 493 U.S. 1056 (1990); *National Federation of Federal Employees* v. *Cheney*, 884 F.2d 603, 612 (D.C. Cir. 1989) (guards at high-security military installations), cert. denied, 493 U.S. 1056 (1990); *Taylor* v. *O'Grady*, 888 F.2d 1189 (7th Cir. 1989) (prison guards in direct contact with inmates).

[4] *International Brotherhood of Teamsters* v. *DOT*, 932 F.2d 1292 (9th Cir. 1991) (drivers of large interstate trucks); *Bluestein* v. *Skinner*, 908 F.2d 451 (9th Cir. 1990) (air traffic controllers, airline flight crews, and mechanics), cert. denied, 111 S. Ct. 954 (1991); *International Bhd. of Electrical Workers, Local 1245* v. *Skinner*, 913 F.2d 1454 (9th Cir. 1990) (natural gas pipeline workers); *Transport Workers' Union* v. *Southeastern Pennsylvania Transp. Auth.*, 884 F.2d 709 (3d Cir. 1989) (public transit workers in safety-sensitive positions).

[5] *National Federation of Federal Employees* v. *Cheney*, 884 F.2d at 614 (drug counsellors); *Policeman's Benevolent Ass'n* v. *Washington Tp.*, 850 F.2d 133 (3d Cir. 1988) (police officers), cert. denied, 490 U.S. 1004 (1989).

[6] Every district court other than the one in this case that has addressed the constitutionality of applicant drug testing has held that practice lawful, even if incumbents could not be tested. *American Postal Workers Union* v. *Frank*, 734 F. Supp. 40 (D. Mass. 1990), appeal pending, No. 91-1633 (1st Cir.); *Transportation Inst.* v. *United States Coast Guard*, 727 F. Supp. 648, 654-655 (D.D.C. 1989); *Owners-Operators Independent Drivers Ass'n* v. *Burnley*, 705 F. Supp. 481, 487 (N.D. Cal. 1989), rev'd on other grounds, 931 F.2d 582 (9th Cir. 1991); *McDonnell* v. *Hunter*, 612 F. Supp. 1122, 1130

cuits, there is no need for review of the decision below.[7]

Petitioner claims that review is warranted since the decision below will establish the governing rule for all applicants for federal employment. Pet. 19-21. Two factors, however, limit the reach of this case. The first is that every DOJ lawyer is subject to what the court of appeals correctly described as a "thorough and exhaustive" and "extraordinarily intrusive" background investigation by the FBI before he can be appointed to his job. Pet. App. 10a, 12a. The vast majority of federal employees undergo a far less extensive investigation.[8] The second fact is that

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n.6 (S.D. Iowa), modified on other grounds, 809 F.2d 1302 (8th Cir. 1987).

Petitioner cites *International Bhd. of Teamsters* v. *DOT*, 932 F.2d 1292, 1307 (9th Cir. 1991), which sustained a Department of Transportation rule requiring pre-employment testing of interstate commercial truck drivers. Pet. 15 n.7. There, however, the jobs involved were safety sensitive, and it was on that basis that the court upheld testing incumbent employees. *Teamsters* thus did not present the question in this case, although the court did note that applicant testing is less intrusive than incumbent testing. 932 F.2d at 1307 ("The level of intrusion, furthermore, is less than that encountered in random testing. No element of surprise is involved. The test is triggered by the job applicant's own voluntary conduct, and will occur only once in the applicant's career.").

[7] Another case, involving the Postal Service, is presently pending in the First Circuit. *American Postal Workers Union* v. *Frank*, *supra*. That case, however, also involves a standing issue, which must be resolved before the merits can be considered.

[8] Such applicants undergo the "National Agency Check and Written Inquiries" (NACI). A NACI is conducted by the Office of Personnel Management (OPM) and involves checking the fingerprint and investigative files of the FBI, OPM,

DOJ is the nation's principal law enforcement agency, and thus has a unique concern with avoiding the appearance of drug use by its lawyers. *Id.* at 14a. The court below relied heavily on those facts, and neither one is generally applicable to employees in other federal agencies. The decision below is therefore far more limited than petitioner claims.

2. The decision below is correct. This Court's decisions in *Von Raab* and *Skinner* make clear that whether drug testing is reasonable turns on the balance between the intrusion on a person's reasonable expectation of privacy and the government's interests involved. *Von Raab*, 489 U.S. at 665-666, 677; *Skinner*, 489 U.S. at 616-620, 633. In this case, the court of appeals correctly determined that the DOJ's

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and the Defense Department. Written inquires are made to former employers, references, schools, and state and local law enforcement agencies. Agencies have discretion to ask OPM to conduct a more exfensive investigation, but OPM does not require it, and further investigation is not common. Before conducting a NACI, OPM typically asks the applicant for a non-sensitive position to complete a Standard Form (SF) 85 (Questionnaire for Non-Sensitive Positions). In contrast to the SF-86 filled out by petitioner, Pet. App. 10a-12a, the SF-85 does not ask the applicant about his membership in organizations; the foreign countries he has visited; the names of his immediate relatives and acquaintances; prior convictions, charges filed, and arrests; bankruptcies and debt judgments; nervous breakdowns and treatment for a mental condition. The SF-85 also does not require the applicant to release his income tax returns, while DOJ applicants must do so. Pet. App. 12a.

The SF-85 does ask for information on past illegal drug use, but only during the past year, instead of the past five years, as required by SF-86. Similarly, the SF-85 asks about residences and jobs for the past five years, while the SF-86 covers the last 15 years.

legitimate governmental interests outweighed an attorney-applicant's legitimate privacy interests.

A job applicant enjoys a lesser expectation of privacy than an incumbent. Applicants understand that they are strangers to a prospective employer, who must investigate their employability, rather than rely on personal observation. Applicants also expect that the government will conduct an extensive background investigation, more extensive than the investigations conducted by most private employers. See Pet. App. 10a-12a. In particular, DOJ applicants know that, as part of the FBI investigation, they must reveal, under penalty of a criminal prosecution for making a false statement, whether they have used the same illegal drugs that are the subject of drug testing. *Id.* at 8a, 11a. Moreover, employment applicants can hardly expect their prospective employers to use a "reasonable suspicion" or "probable cause" standard in determining what questions to ask or what tests to require during the application process.[9] Instead, prospective employers may be expected to use a "checklist" approach: that is, if a particular subject is pertinent to the job, *every* job applicant will be asked the appropriate questions and given the appropriate tests, not merely those applicants for whom there is "reasonable suspicion" that a problem

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[9] Unless the applicant is an incumbent employee seeking a new job within the agency, as in *Von Raab*. The DOJ drug testing plan for its Offices, Boards, and Divisions (OBDs), however, does not apply to such persons. The plan defines "applicant" as "any individual not currently employed by the OBDs who is tentatively selected for employment with the OBDs or is employed in the OBDs and identified for placement in a [sensitive position designated for random testing of incumbent employees]." Pet. App. 93a-94a.

exists.[10] Finally, applicants for any job must expect that drug use in, and by members of, the workplace is a matter of concern to a potential employer, particularly at DOJ. Medical tests are frequently required of applicants for public as well as private employment. Also, as the court of appeals recognized, a drug test that is administered in a manner respecting privacy is similar to the tests given as part of a typical physical examination required by many prospective employers. Pet. App. 8a. In sum, when a drug test is administered in a courteous and professional manner, following procedures that are typical of medical examinations, the test falls well within the reasonable expectations of a job applicant.

An employer also has no prior opportunity to observe an applicant in the workplace. Pet. App. 16a. A drug test is part of the process that helps the prospective employer overcome this lack of knowledge. By contrast, an incumbent employee is not a stranger, and his employer should not need a test to know whether he is a good employee. In addition, empirical studies reveal "an extremely high correlation" between drug use and employment difficulties. Pet. App. 15a-16a. For incumbent employees who do not occupy a safety- or security-sensitive position, an employer can wait until a problem is observable in the workplace before taking steps. But such a procedure

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[10] For example, an applicant for an airline pilot's job would expect to undergo tests measuring his cardiovascular functioning, regardless of whether there is anything in his history, habits, or personal appearance that gave rise to reasonable suspicion that he has a heart problem. In fact, FAA regulations require airline pilots to have a first-class medical certificate; applicants for such a certificate over age 35 must take an electrocardiographic examination. 14 C.F.R. 61.151, 67.13(e).

makes no sense for applicants, and no employer designs its employment application process on the premise that potential areas of concern may be ignored because a person can later be fired if problems surface. In sum, a reasonable suspicion requirement may be a reasonable standard for incumbents, but it is an altogether impractical standard for applicants. Pet. App. 16a-18a.[11]

3. Relying heavily on the dissent below, petitioner claims that the court of appeals erred in failing to require a "nexus" between the injury that could stem from an employee's drug use and the specific job at issue. That argument, however, is misdirected.

In cases involving the suspicionless drug testing of incumbent employees, the courts have considered whether there is a "nexus" between the particular job at issue and the harm that a job-holder using drugs could cause in determining whether suspicionless drug testing is "reasonable" for Fourth Amend-

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[11] Judge Henderson erred in concluding that the FBI background investigation enables the government to have as complete a picture of an applicant as it has of incumbent employees; in fact, FBI background investigations can and have missed problems that surfaced only after employment began, as the majority below noted. Pet. App. 24a-26a. The Fourth Amendment does not require the government to "hire now, fire later." For the same reason, Judge Henderson erred in believing that drug testing should be subject to the same limitations for applicants as for incumbents because an applicant's drug use does not harm an employer until the applicant is hired. Pet. App. 21a-22a. An employer can observe an incumbent's on-the-job performance, but not an applicant's. Drug testing is a reasonable means of overcoming an employer's lack of information. While the potential harm from drug use is the same for applicants and incumbents, an employer has an alternative way of discovering drug use by incumbents that is not available for applicants.

ment purposes. An applicant, however, is not in the same position as an incumbent, since an employer has no opportunity to observe the applicant at work before the hiring decision is made. That fact therefore alters the total mix of facts that comprise the balance under *Von Raab*. But the court of appeals did identify a similar type of "nexus" here: empirical studies showing "an extremely high correlation between a positive result in a pre-employment drug test and subsequent employment problems" and the DOJ's concern with the effect of drug use by lawyers on the DOJ's credibility as the nation's principal law enforcement agency. Pet. App. 14a, 16a. To be sure, that nexus is not sufficient to justify testing all incumbent employees, since an employer can be required to observe the employee on the job to determine whether he uses illegal drugs (except in those instances in which "a single slip-up * * * may have irremediable consequences" before the employer notices a problem, *id.* at 21a (quoting *Harmon*, 878 F.2d at 491)). But as explained above, an employer has no prior opportunity directly to discern whether a job applicant has a drug problem.[12]

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[12] Petitioner claims that the decision below conflicts with *Rutan* v. *Republican Party*, 110 S. Ct. 2729 (1990). *Rutan* held that the First Amendment limits patronage-based hiring and discharge decisions, without distinguishing between them. Relying on *Rutan*, petitioner maintains that the court below erred in distinguishing between incumbents and applicants for purposes of the Fourth Amendment. Pet. 13-14. That claim lacks merit. To begin with, *Rutan* did not reject the statement in *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 282-283 (1986) (plurality opinion), that not being hired (or promoted) is less burdensome than being discharged. 110 S. Ct. at 2739. In addition, party affiliation is not a disqualification for any position at DOJ, but drug use is. Thus, the issue is how DOJ can determine whether that disqualifica-

Petitioner claims that the court of appeals erred by relying on the drug testing policies followed by private employers, since the Fourth Amendment does not govern their conduct. Pet. 16-18. But in this context the government is not acting in a law enforcement capacity, but as an employer, see *O'Connor* v. *Ortega*, 480 U.S. 709, 719-726 (1987) (plurality opinion), so the practices followed by private employers are relevant to an applicant's privacy expectations. Social conventions inform the determination whether an individual's subjective expectation of privacy is one that society is prepared to endorse as "reasonable," see *Minnesota* v. *Olson*, 110 S. Ct. 1684, 1689-1690 (1990) (customs and social conventions establish that an overnight guest has a reasonable expectation of privacy), so there is no reason to exclude such information from the drug testing context. It would be unrealistic to assume that society has two entirely different sets of expectations for the hiring practices of public and private employers.

Finally, petitioner criticizes the court of appeals for adverting to the fact that a DOJ applicant has advance notice of the testing requirement as well as the date of the actual test. Petitioner contends that advance notice cannot validate what would otherwise be an unconstitutional search. Pet. 18-19. The court of appeals, however, considered advance notice merely as "one of the factors" relevant to the degree of the intrusion on privacy. Pet. App. 9a (quoting *National Federation of Federal Employees* v. *Weinberger*, 818

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tion is present in the case of an applicant. *Rutan* did not modify the Fourth Amendment balancing test in *Von Raab* and *Skinner* that is used to determine whether drug testing is a reasonable means of making the inquiry. The difference between incumbents and applicants noted in *Wygant* is a legitimate factor to consider in that balance.

F.2d 935, 943 (D.C. Cir. 1987)). In this respect, the court followed *Von Raab*, which also cited advance notice of a drug test as a factor "reducing to a minimum any 'unsettling show of authority' * * * that may be associated with unexpected intrusions on privacy." 489 U.S. at 672 n.2. The decision below is therefore fully consistent with *Von Raab*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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